-167 FILE COPY

Supreme Court, U. S.
FILED
JUL 31 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1972

No. 72-167

ANN GUNTER DRUMMOND, ET AL.,

Petitioners

vs.

ROBERT L. ACREE, ET AL.,

Respondents

vs.

COUNTY BOARD OF EDUCATION OF RICHMOND COUNTY, GEORGIA, ET AL.,

Respondents

Petition For A Writ Of Certiorari

To the United States Court of Appeals for the Fifth Circuit

O. TORBITT IVEY, JR.
Suite 500
The 500 Building
Augusta, Georgia 30902
Attorney for Petitioners

TABLE OF CONTENTS

Prayer 1

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Constitutional Provisions Involved 3

Statement 3

1. Proceedings in the District Court (Prior to 1970) 3
2. Proceedings in the District Court (1970) 4
3. Proceedings in the Court of Appeals (1970-1971) 5
4. Proceedings in the District Court (1971-1972) 6
5. Proceedings before the Court of Appeals (1972) 7

Reasons for Granting the Writ 8

Conclusion 21

Appendix I — Judgment of the United States Court of Appeals for the Fifth Circuit A-1

Appendix II — Order of the United States Court of Appeals for the Fifth Circuit A-6

Appendix III — Opinion of the United States District Court of the Southern District of Georgia A-7

Appendix IV — Education Amendments Act 1972, Title VIII A-33

Appendix V — Desegregation Plan Filed in District Court on September 27, 1971 ..... A-37

INDEX OF AUTHORITY

Table of Cases

Acree v. County Board of Richmond Co., Ga., 294 F.Supp. 1034 (S.D. Ga. 1968) 4

Acree v. County Board of Richmond Co., Ga., 301 F.Supp. 1285 (S.D. Ga. 1969) 4

Acree v. County Board of Richmond Co., Ga., 443 F. 2d 1360 (5th Cir. 1971) 5

Acree v. County Board of Richmond Co., Ga., 458 F2 486 (5th Cir. 1972) 7

Acree v. Drummond, 336 F.Supp. 1275 (S.D. Ga. 1972) 7

Bradley v. The School Board of The City of Richmond, Virginia ____ F2d ____ (4th Cir. 1972) decided June 5, 1972 9

Calhoun v. Cook, ____ F.Supp. ____ (N.D. Ga. 1972) decided June 8, 1972 16

Davis v. Board of Education of North Little Rock, Ark., 328 F.Supp. 1197 (E.D.Ark. 1971) 15

Ellis v. Board of Public Instruction, 423 F.2d 203 (5th Cir. 1970) 5

Ex Parte McCardle, 74 U.S. 264, 7 Wall 506, (1869) 20

Goss v. Board of Education of City of Knoxville, Tenn., 444 F2632 (6th Cir. 1971) 15, 16

Katzenback v. Morgan, 384 U.S. 641, 86 S.Ct. 1717 (1966) 19

Keyes v. School District No. 1, Denver, Colorado, 445 F2d 990 (10th Cir. 1971) 19

Lockerty v. Phillips, 319 U.S. 182, 63 S.Ct. 1019 (1943) 20

Singleton v. Jackson Municipal Separate School District, 419 F2d 1211 (5th Cir. 1970) 5

Swann v. Charlotte-Mecklenburg Board of Education, 311 F.Supp. 265 (W.D. N.Car. 1970) 13

Swann v. Charlotte-Mecklenburg Board of Education, 431 F.2d 138 (4th Cir. 1970) 12, 14

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267 (1971) ..... 2 thru 18

Winston-Salem/Forsythe County Board of Education, v. Scott, 404 U.S. 1221, 92 S.Ct. 1236 (1972) ... 2, 9

Statutes Cited

Civil Rights Act of 1964, § 407 (a), 42 USC 2000c-6 ..... 3, 18

Education Amendments of 1972, enacted June 23, 1972 ..... 3, 17, 18

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1972

No.———

ANN GUNTER DRUMMOND, ET AL.,

Petitioners

vs.

ROBERT L. ACREE, ET AL.,

Respondents

vs.

COUNTY BOARD OF EDUCATION OF RICHMOND COUNTY, GEORGIA, ET AL.,

Respondents

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

Petitioners pray that a Writ of Certiorari issue to review the Judgment entered March 31, 1972 by the Uunted States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Judgment entered March 31, 1972 by the United States Court of Appeals for the Fifth Circuit is reported at 458 F.2d 486 (1972) set forth in Appendix I. It affirmed the Order of the United States District Court for the Southern District of Georgia rendered January 13, 1972, reported at 336 F.Supp. 1275 (1972) and set forth in Appendix III.

JURISDICTION

Petition for Rehearing on the Judgment entered by the United States Court of Appeals for the Fifth Circuit was denied May 2, 1972 and is set forth in Appendix II. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Can an order of the District Court which requires that the racial composition of elementary schools be almost identical to the mathematical ratio of the entire system contrary to **Swann v. Charlotte-Mecklenburg Board of Education** 402 U.S. 1 (1971), **Winston-Salem/Forsythe County Board of Education v. Scott,** 404 U.S. 1221 (1972) be allowed to stand?
2. To what extent is the increased transportation of elementary students to achieve racial balance constitutionally permissible?
3. Does **Swann,** supra, require a school system, previously operating pursuant to a desegregation plan prepared by HEW and approved by the District Court, to immediately undergo massive busing without determining the feasibility of constitutionally acceptable, but less burdensome alternatives?

4. Is the 1972 **Education Amendments Act** which restates a portion of § 407(a) **Civil Rights Act of 1964**, forbidding Courts to order bussing for racial balance, a Congressional expression that the interpretation of this language contained in **Swann** is incorrect?

5. Is the 1972 **Education Amendments Act** a Congressional determination on how best to implement the 14th Amendment so as to withdraw jurisdiction from the entire class of cases?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following provisions of the Constitution of the United States:

1. Article I, Section 8, Clause 18 (Necessary and Proper Clause)
2. Article III, Section 1 and 2 (Jurisdiction Clause)
3. Section 1 of the 14th Amendment (Equal Protection Clause)
4. Section 5 of the 14th Amendment (Enforcement Clause)

STATEMENT

1. PROCEEDINGS IN THE DISTRICT COURT (PRIOR TO 1970)

Petitioners are a class of parents who were granted intervention in 1971.[1] At that juncture this case

[1] Petitioners/Intervenors are Ann Gunter Drummond, Mason Carter Clements, Mrs. S. Lee Wallace, Nadine Estroff, Douglas D. Barnard, Jr., Robert Beattie, Bill Perry, Dr. James R. Hattaway, William J. Salley, Patrick G. Smith, C. Dan Cook, Earl E. Hensley, William B. Kuhlke, Jr., George H. Streeter, George W. Fisher, Freddie Childress, Leona Norton, H. Weldon Hair, Howard W. Poteet.

was already seven years old having been commenced in 1964 by black parents seeking to desegregate the school system. This litigation has followed the evolution from "freedom of choice" in a pattern not dissimilar to other school districts.

Jurisdiction was assigned to the current District Court Judge shortly after his appointment in 1968. At a hearing held in December of that year the school board was directed to prepare a desegregation plan based on geographical zones and attendance areas. **Acree v. County Board of Education of Richmond Co., Ga.**, 294 F.Supp. 1034 (S.D.Ga. 1968).

Such a plan was submitted and approved on July 14, 1969. **Acree v. County Board of Education of Richmond Co., Ga.**, 301 F.Supp. 1285 (S.D.Ga. 1969). Shortly thereafter the school board was directed by the Court to seek the assistance of the Department of HEW in future planning.

2. PROCEEDINGS IN THE DISTRICT COURT (1970)

By order of February 3, 1970 the District Court required that the faculty be reconstituted on a racial balance of 60%-40% white to black. Accordingly, some 500 teachers were reassigned to achieve this distribution. Plaintiff subsequently appealed, and in July of 1970 the Circuit Court remanded this case for further findings. No decision was announced and jurisdiction was retained.[2]

Upon receipt of the Mandate, a Biracial Com-

[2] This portion of the chronology appears to conflict slightly with that set out in Appendix III. It is supported by entries in the docket kept by the Clerk of Court.

mittee was appointed by the District Judge, charged with preparing recommendations for the possible pairing of schools in the system. Additionally, the desegregation plan developed by the Department of HEW had been completed and was submitted to the Court. It was approved by order dated August 3, 1970, with implementation scheduled for the forthcoming 1970-1971 school year.

Also incorporated in this order were the suggestions of the Biracial Committee on pairing, as well as majority to minority transfer provisions required by **Singleton v. Jackson Municipal Separate School District,** 419 F.2d 1211 (5th Cir. 1970). Also included was the proviso that space and free transportation be made available for the transferring student. **Ellis v. Board of Public Instruction,** 423 F.2d 203 (5th Cir. 1970).

3. PROCEEDINGS IN THE COURT OF APPEALS (1970-1971)

Pursuant to instructions, the Record had been returned to the Circuit Court in August of 1970 where it was retained for 11 months. During this period an entire school year was completed under the Plan devised by the Department of HEW. In April of 1971, the decision in **Swann v. Charlotte-Mecklenburg Board of Education,** 402 U.S. 1 (1971). was announced. Accordingly, this case was remanded by the Appeals Court on July 1, 1971 with instructions to devise a new plan in consonance with that opinion. **Acree v. County Board of Education of Richmond Co., Ga.,** 443 F.2d 1360 (5th Cir. 1971).

4. PROCEEDINGS IN THE DISTRICT COURT (1971-1972)

Defendant school board was instructed to commence preparation at once. In a subsequent order of July 28, 1971 the District Court further requested that the Office of Education, Department of HEW, make its full resources available in this regard.

A hearing on their proposals plan was scheduled for August 26, 1971. What transpired is described in the Court's Order:

> "To my amazement, the HEW officials did not show up at the August 26, 1971 hearing. Without notice or excuse, and at whose behest, I do not know, they did a disappearing act."[3]

Being understandably irate, the Court rejected the school board recommendation with dispatch. It was announced from the Bench that experts would be employed for the preparation of desegration plans to be filed by September 27, 1971. Two Rhode Island professors were subsequently chosen. They drafted a series of options for the District Judge which consisted of four Elementary Plans and two Secondary Plans.

Intervention was sought at this crucial point. It was granted on October 5, 1971 and Petitioners, freshly garbed with legal status, set out to resolve the existing impasse. Unfortunately this goal was not achieved, but efforts to do so were later recognized in open court by the District Judge who remarked:

> "I say you deserve a lot of credit for what you have tried to do, to bring these warring fac-

[3] Appendix III, Page A-13

tions, in a terribly polarized city and community together."[4]

At the Intervenors request a hearing was held December 16th and 17th for the purpose of presenting evidence concerning the various Plans in question. Upon conclusion the Bench announced that no decision was forthcoming for 20 days. All counsel were called into Chambers and strongly advised to make a final effort at negotiation. Efforts to reach an agreement ultimately proved futile and on January 13, 1972 the Order complained of was entered.[5] **Acree v. Drummond,** 336 F.Supp. 1275 (S.D.Ga. 1972).

5 PROCEEDINGS BEFORE THE COURT OF APPEALS (1972)

Plaintiff immediately commenced an Appeal and both remaining parties Cross-Appealed. The United States Court of Appeals for the Fifth Circuit in an opinion rendered March 31, 1972 affirmed the ruling of the Lower Court.[6] **Acree v. County Board of Education of Richmond Co., Ga.,** 458 F.2d 486 (5th Cir. 1972). Petitioners sought Re-Hearing and were subsequently denied.[7]

Pursuant to the Order on the Mandate, Defendant school board prepared and presented a Constitutionally-acceptable plan for the desegregation of the secondary schools in the upcoming year. By order dated June 13, 1972 this plan was approved by the District Court.[8] No appeals were taken, and the time for doing so has expired.

---

[4] Transcript of proceedings December 17, 1971, Page 286.
[5] Appendix III hereto, details of Plan Appendix IV hereto.
[6] Appendix I hereto.
[7] Appendix II hereto.
[8] It is in sharp contrast with the severity of the elementary plan which Petitioners seek to have remoulded.

REASONS FOR GRANTING THE WRIT

I

THIS IS THE MOST EXTREME DESEGREGATION ORDER EVER ENTERED! IT GOES FAR BEYOND ANYTHING APPROVED BY THIS COURT, AND IF DEEMED VALID THE CRITERIA ESTABLISHED BY SWANN BECOMES ABSOLUTELY MEANINGLESS.

This claim, although extravagant, is well founded. All that is required to reach this conclusion in the present case is the application of principles established by **Swann,** and a comparison of results.

While this Court recognized the transportation of students as a permissible tool for desegregation, its use was not made mandatory. Much to the contrary there is a clear caution that the techniques used in Charlotte were made acceptable by the situation which confronted the District Court.

> **"On the facts of this case,** we are unable to conclude that the order of the District Court is not reasonable, feasible and workable." (p. 30) **(Emphasis added)**

An overall reading of this decision leaves the indelible impression that the best which can be said of the District Court's order is that it was not reversed. It was never applauded and reflects only tepid acceptance. Restraint rather than adherence is implicit and inclines one to view it as the outward limits of discretion.

While a Court's authority to fashion appropriate remedies is correspondingly broad, it is not unrestricted.

"No fixed or even substantially fixed guidelines can be established as to how far a court can go, **but it must be recognized that there are limits.**" (p. 28) (Emphasis added)

A recent lower court decision of considerable importance underscored this limitation, **Bradley v. The School Board of the City of Richmond, Virginia,** _____ F.2d _____ (4th Cir. 1972), decided June 5, 1972.

Although the outward parameters of **Swann** may be vague, certain prohibitions are most explicit. A prime example of what a District Judge may not do is illustrated by the claim that a particular degree of racial balance was required in Charlotte schools.

The record discloses that the order resulted in elementary schools whose composition ranged from 9% to 38% black as opposed to the system-wide average of 29%.

Chief Justice Burger articulated quite forcefully on this issue:

"If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, **that approach would be disapproved and we would be obliged to reverse.**" (p. 24) (Emphasis added)

reiterated at **Winston-Salem/Forsyth County Board of Education v. Scott,** 404 U.S. 1221 (1972).

A comparison with the desegregation plan ordered for the elementary schools of Richmond County shows unquestionably that this imperative was either miscostrued or misapplied.

This plan required that 29 of the existing 42

elementary schools be paired or grouped into 10 separate zones with racial distribution as shown below:*

Zones	Schools	Pupils	% Black	
A	4	1522	40.8	
B	4	2154	46.1	
C	3	2189	44.4	
D	3	1940	43.7	
E	2	652	44.0	
F	2	1198	30.2	
G	3	960	38.8	
H	3	1080	43.1	
I	2	1113	40.1	
ALT.	3	1684	34.2	
TOTALS	29	14,492	41.02	Overall Black

From the diagram one is forced to conclude that awareness of the 60%-40% racial composition of the whole system was not utilized simply as a useful starting point in shaping a remedy. In the final analysis Court-ordered clustering results in an overall black percentage that deviates only 1.02% from the system average.

Even the individual zones evidence a persistent abherence to this ratio. This point is illustrated by the permissible range of variation from the overall average. In Charlotte a fluctuaiton of 29% was accepted, whereas the latitude here is only 15% or 1/2 that amount. Stated conversely, the restriction imposed on Augusta was twice as extreme.

Based on all these factors, it cannot be said that "the very limited use made of mathematical ratios was within the discretion of the Court." On the contrary,

* Appendix V hereto.

it is the product of a desegregation plan which relied entirely upon them. Such a standard is Constitutionally impermissible.

These results are achieved by a massive increase in transportation. This is a volatile subject which Swann dealt with in a most guarded manner:

> "The scope of permissible transportation of students as an implement of a remedial decree has never been defined by this Court and by the very nature of the problem it cannot be defined with precision." (p. 29)

Under the "Finger Plan" 9,300 additional elementary students were required to be transported from a total Charlotte elementary population of 44,000. No figures were reported on the number bused prior, but the total for the entire system amounted to 21%.

In Richmond County there are 21,795 elementary students, of which 6,945, or 31.86%, were already being bused.[10] The order of the District Court required a transportation increase of 6,172 elementary students.[11]

This escalation has very startling consequences, for it creates a situation in which 61.77% of the elementary school children must now be bused.

Even more drastic is the impact upon the students in the 29 schools paired or clustered. Under the HEW plan 21.57% of the students enrolled in these

---

[10]All computations concerning Augusta-Richmond County Schools are based on figures contained in the Munzer Plans, a portion of which is set out in Appendix V hereto.

[11]6,172 reflects the correct increase in elementary busing. It is in conflict with the figure of 5,681 as shown by the District Court's Order, Appendix III hereto, which fails to include Alternate Zone.

schools were bused, a figure which now soars to 64.16%.

In considering the elementary portion of the Charlotte plan the Circuit Court determined that its increases were too extreme. They illustrated this conclusion by a formula which provides a useful comparison here.[12]

Percentage Increase of Additional Elementary Students Bussed As Opposed To All Students

	Presently Bussed	
Charlotte	39% or 33%	as Computed by Minority
Richmond County	58%	

By this standard the disparity is perhaps more apparent. The increased elementary busing in this case is at least 19% greater than the figure classified by one Court as too extreme.

Even though this portion of **Swann** was ultimately reversed there is no indication that such increases would be approved elsewhere. Certainly there is nothing to indicate that they could be expanded to an even greater extent.

Perhaps the most formidable consequence of the District Court's Order is the effect it has on the grade structure of elementary schools. Previously the school system had been operated on a 7-2-3 basis which enabled a child to complete the first seven years in one school.

Pursuant to this order 69% of the elementary schools have been paired or clustered. They no longer

[12] 431 F.2d 138, 147 (4th Cir. 1970).

have a standard grade structure, as the number of grades in a particular school depends on the number of schools in its zone. The size of the zone also dictates the number of schools a child must now attend during the course of elementary education.

Seven zones are composed of either three or four schools. The students who attend these schools constitute 53% of the entire elementary population. Thus we have a situation which requires over 1/2 of the elementary children in the system to attend three or four separate schools in seven years.

The absurdity of this arrangement is emphasized by comparison with the "Finger Plan."[13] It served to pair or cluster 46% of Charlotte elementary schools in such a manner as to achieve a 1-4 and 5-6 grade structure.

By these categories compulsory changes are minimized. Elementary children will therefore attend, at the most, only two schools. This is a factor readily distinguished from the procrustean demands of the Augusta counterpart.

A portion of **Swann** is addressed directly to this combination of evils:

> "An objection to transportation of students may have validity when the time or distance of travel is so great as to risk either the health of the children or significantly impinge on the educational process." (p. 30)

Transportation of better than six of every ten elementary students, some over long distance, in conjunction with the requirement that 53% must attend

[13] 311 F.Supp. 265, 280, 281 (W.D. N. Car. 1970).

three or four elementary schools is indeed a situation which, "impinges on the educational process."

A school desegregation plan must also have room for pragmatic considerations. A restriction is implicit in Swann:

> "25. The remedial technique of requiring bus transportation of public school students for purposes of racial desegregation is within a Federal District Court's power to provide equitable relief, where . . .
>
> ****
>
> (2) implementation of the District Court's decree is well within the capacity of the local school authority." (Emphasis added)

This was resolved affirmatively in Charlotte for obvious reasons. The school system had a total operating budget of $51,000,000 of which approximately $500,000, or less than 1% (.0098), was spent for annual transportation costs.[14]

The cost of increased elementary transportation was determined to be $672,000, or only 1.2% of the annual budget. Combined with current transportation expenditures it amounted to no more than 2.3% of that budget.

A radically different situation exists for Augusta's school system whose annual budget is only $21,000,000. Of this sum $572,000 was spent for transportation before the Court order. This is 2.7% of the total budget and represents a larger portion than was spent in Charlotte even after the increased elementary costs.

Here the additional transportation will require $644,000,[15] or 3.7%, of the budget. When combined

[14] 431 F.2d 138, 156 (4th Cir. 1970).

[15] This is a minimum figure and requires that schools be opened at staggered hours ranging from 7:30-10:30 A.M.

with current outlays it amounts to some 5.8%. The aggregate of these costs, irrespective of percentages, is $44,000 more than the comparable figure in Charlotte.

In the space of a single year this school system has been wrenched to an unbelievable extreme. Only 12 months ago schools were operated under an HEW plan approved by the District Court.

Without respite or interlude it is now decreed that an incredible gulf be leaped in a single bound. How has this all come about? The only plausible answer is that the lower court misread the requirements of **Swann.**

Very persuasive support for this proposition is found in the words of the District Judge wherein he categorizes it as the "Busing" and "Racial Ratio Case".[16]

Several other Courts have viewed it differently, and, I think, properly.

> "While this case approved the use of busing as one tool for school desegregation, it did not hold that the plan implemented in Charlotte was a Constitutionally commanded Plan, or that a less drastic Plan might not have met Constitutional requirements." **Davis v. Board of Education of North Little Rock, Ark.,** 328 F.Supp. 1197, 1204 (E.D. Ark. 1971).

Even more emphatically:

> **"We therefore, initially observe that while the Supreme Court found legally tolerable what may be referred to as the Mecklenburg rule, it by no means directed that its commands be obeyed everywhere.** (p. 636)

[16]Appendix III hereto.

And later:

> "Swann approved a District Court ordered plan for the busing of children to improve the racial mix in the involved school system. **It did not, however, direct that a plan of transporting school children must be a part of every new plan for improvement of the objective of desegregation."** GOSS v. BOARD OF EDUCATION OF CITY OF KNOXVILLE, TENN., 444 F.2d 632, 637 (6th Cir. 1971). (Emphasis added)

Recent Courts in some instances have even found busing to be undesirable. A graphic example may be seen in **Calhoun v. Cook,** _____ F.Supp. _____, (N.D. Ga. 1972) decided June 8, 1972. Here the District Judges for the second time expressly rejected a mass busing plan for Atlanta, Georgia.

This determination was reached after an incisive appraisal of busing, its ramifications, and the competing interests involved.

Such a conclusion is justified by the words of Chief Justice Burger:

> "A school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. **The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution."** (Emphasis added.) (pp. 15, 16)

This clearly contemplates that busing is a remedy that must be chosen and limited with regard to other values upon which it impinges.

The availability of less rending solutions is well illustrated by the secondary schools. A constitutional plan for their desegregation was approved by the

same Court on June 13, 1972. It did not require the extremes of the elementary plan, more importantly, it was accomplished without significant increase in busing.

We therefore have a complete inversion with the burdens cast upon the young. Certainly this is a travesty **Swann** intended to avoid by recognizing that the limits on permissible transportation would be affected by many factors:

> **". . . but probably with none more than the age of the students." (p. 31)** (Emphasis added)

II

LEGISLATION ENACTED JUNE 23, 1972 IS IN APPARENT CONFLICT WITH CONCLUSIONS REACHED BY THIS COURT IN SWANN. ITS LANGUAGE HAS NOT BEEN INTERPRETED BY ANY COURT AND GIVES RISE TO ISSUES WHICH MAY AFFECT EVERY AREA OF THE COUNTRY.

The foregoing reflects quite aptly the vicissitudes of Constitutional interpretation in this area of law. Recent legislation promises further obfuscation and constitutes a valid quandary.

With passage of the EDUCATION AMENDMENTS OF 1972 Congress has rejuvenated issues once thought resolved. The relevant provisions are set out in Title VIII, § 803-806, captioned **"Prohibition Against Assignment or Transportation of Students to Overcome Racial Imbalance."**[17]

Of immediate significance is § 806 which directs

[17]Appendix IV hereto.

that a proviso, of the 1964 Civil Rights Act, shall apply to the entire United States. The substance of this proviso is that no Court shall be empowered to order the transportation of students to achieve racial balance. It is a restatement of the identical language interpreted by Swann with the added requirement of uniform application.

Obviously, however, Congress did not subscribe to the meaning accorded their words by this decision. Had this not been the case there would have been no need for subsequent repetition.

All of this brings us to a perplexing impasse. § 806, on its face, seems to preclude an order such as the one contained in this case. A result entirely to the contrary was reached by Swann based primarily upon the disparate status of de jure and de facto states.

Both versions cannot be reconciled. The interpretation arrived at by this Court depends upon a distinction, while uniformity requirements of subsequent identical legislation demand that there be none.

A further example of the legislative intention to abrogate this historical distinction is provided by § 805 which states:

> "The rules of evidence required to prove that State or local authorities are practicing racial discrimination in assigning students to public schools shall be uniform throughout the United States."

Discrimination by state authorities is a basic ingredient of the facto — de jure, dichotomy. The standards of proof in this regard have been quite different.

Keyes v. School District No. 1, Denver, Colorado, 445 F.2d 990, 1006, (10 Cir. 1971).

Both of these sections are worded to insure absolute parity. Such a result is incompatible with the perpetuation of this hoary distinction. There must now be one uniform classification of states.

Consequently two alternative interpretations are possible. Either Congress has created a right of action in de facto states or the prohibition of Court ordered transportation applies in de jure situations.

The latter conclusion seems infinitely more plausible. It is substantiated by the fact that both provisions are contained in legislation which is clearly recognized as "anti-busing" in nature. This consideration is especially important with regard to § 806 whose language was first contained in the 1964 Civil Rights Act, a measure concerned only with the promulgation of desegregation.

The prohibition of Court ordered transportation for racial balance is a legitimate exercise of the "enforcement powers" granted Congress by § 5 of the 14th Amendment. This is a positive grant of legislative power entrusting to Congress the same broad powers afforded them by the "Necessary and Proper" clause of the Constitution, Art. I, § 8, cl. 18. Katzenback v. Morgan, 384 U.S. 641, 651 (1966).

By restating the law in this manner Congress has imposed a simple and prudent restriction on how the goals of this Amendment are best accomplished. Desegregation is not prescribed, only a method. There are still half a dozen or more remedies, currently used

in school cases, which remain available to a District Court.

Article III empowers Congress to create inferior Federal Courts. The Constitution grants no original jurisdiction to such courts, it comes from Congress. It is axiomatic, therefore, that the body empowered to grant jurisdiction may take it away.

> "The congressional power to 'ordain and establish' inferior courts includes the power of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." **Lockerty v. Phillips**, 319 U.S. 182, (1943).

Congress has therefore limited the jurisdiction of District Courts to issue busing orders. Jurisdiction is the power to declare the law and without it all that remain is to dismiss the cause. **Ex parte McCARDLE**, 74 U.S. 264 (1869).

CONCLUSION

For the foregoing reasons it is submitted that the petition for certiorari should be granted to review the order entered January 18, 1972, and the judgment entered March 31, 1972, by the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted

O. TORBITT IVEY, JR.

Suite 500
The 500 Building
Augusta, Georgia 30902
Attorney for Petitioners

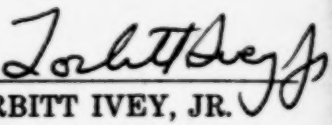
July 28, 1972

HARRIS, CHANCE & McCRACKEN

CERTIFICATE OF SERVICE

This is to certify that I have on this day served the Honorables Franklin H. Pierce, Leonard O. Fletcher, Jr., and J. H. Ruffin, counsel for respondents, by personally handing them three copies each of the within Petition for Writ of Certiorari.

This 28 day of July, 1972.



O. TORBITT IVEY, JR.
Suite 50
The 500 Building
Augusta, Georgia 30902
Attorney for Petitioners

APPENDIX I.

IN THE

United States Court Of Appeals

FOR THE FIFTH CIRCUIT

No. 72-1211

ROBERT ACREE, ET AL.,
Plaintiffs-Appellants-
Cross Appellees,

versus

COUNTY BOARD OF EDUCATION OF
RICHMOND COUNTY, GEORGIA, ET AL.,
Defendants-Appellees-
Cross-Appellants,

versus

ANN GUNTER DRUMMOND, ET AL.,
Intervenors-Apellees-
Cross Appellants.

Appeals from the United States District Court
for the Southern District of Georgia

(March 31, 1972)

Before BROWN, Chief Judge, MORGAN and
INGRAHAM, Circuit Judges.

BY THE COURT: These are appeals from the order of the district court dated January 13, 1972, directing implementation of a desegregation plan for the schools of Richmond County, Georgia. The history of this case is well documented by the district court. **Acree, et al v. Drummond, et al v. County Board of Education of Richmond County, Georgia. et. al,** ___ F. Supp. ___ (S.D., Ga., January 13, 1972).

The County Board of Education and Intervenors raise numerous objections to the desegregation plan being implemented by the district court, most of which do not even merit discussion. The major contention is that the district court erred in requiring "forced bussing" to achieve racial balance, in violation of the equal protection clause of the Fourteenth Amendment and of Title IV of the Civil Rights Act of 1964.[1]

In **Swann v. Charlotte-Mecklenburg Board of Education,** 402 U.S. 1 (1971), the Court made quite clear that bussing is an available tool for use by district courts in achieving school desegregation. In the instant case the district court utilized this tool along with the pairing, clustering and zoning methods long authorized by the Supreme Court and this court. **Swann v. Charlotte-Mecklenburg Board of Education, supra; Davis v. Board of School Commissioners of Mobile County,** 402 U.S. 33 (1971); **Boykins v. Fairfield Board of Education,** ___ F.2d ___ (5th Cir., 1972) [No. 71-3028, Feb. 23, 1972]; **Singleton v. Jackson Municipal Separate School District,** 432 F.2d 927 (5th Cir., 1970).

---

[1] 42 U.S.C. § 2000c.

The argument that the equity powers of federal district courts have been limited by Title IV of the Civil Rights Act of 1964 has been rejected in **Swann**, where the Court found no intent on the part of Congress to restrict the powers of federal courts to enforce the equal protection clause or "to withdraw from courts their historic equitable remedial powers." 402 U.S. at 17.

The board and intervenors contend, however, that the district court's order irreparably harms "quality education" in Richmond County. The district court should not, and did not, permit the use of such platitudes to perpetuate a dual school system, nor could it permit defendants to reply on the inferiority of certain school facilities to which children were to be transferred as a justification for continued racial discrimination. The Court in **Swann** stated unequivocally:

> "In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system. 402 U.S. at 16."

The Richmond County Board of Education has operated and continues to operate a **de jure** as well as a **de facto** segregated system, and has long been under order to desegregate. **See Acree v. County Board of Education of Richmond County, Ga.**, 399 F.2d 151 (5th Cir., 1968). Despite a clear duty, the Board has offered no viable **constitutional** alternative to the plan implemented by the court below, but instead has en-

gaged in conduct only designed to disrupt and delay

the disestablishment of a dual system.

From our review of the plan adopted by the district court and the evidence presented, we are of the firm view that there is no indication whatsoever that the transportation required as a result of the court's plan would adversely affect the health of the children or impinge on the educational process. We are also convinced that a **good faith** effort by the school board will overcome any logistical problems that might arise.

The issues raised by plaintiffs have been dealt with by our prior order of February 8, 1972, in which we required the district court to consider plaintiffs' alternate plan along with those submitted by the court's experts in the development of a unitary system for the secondary schools of Richmond County.

We too recognize the practical problems which forced the district court to delay implementation of a plan for the secondary schools, and there are now little more than two months remaining in the school year. However, in view of the serious delays which have occurred in this case over past years, we order that a plan be developed immediately for the secondary schools, that some demonstrable progress be made now[2] and that a schedule be adopted forthwith in order that a constitutional plan will be implemented at the beginning of the 1972-73 school year.

ACREE v. CTY. BD. OF EDUC. OF RICHMOND

The district court is required to take whatever steps are necessary under its equity powers to assure

[2] For example, transportation facilities needed as a result of the plan should be arranged, funds applied for, budget changes contemplated, etc.

compliance and cooperation from the school board in implementing a plan for the secondary schools and in carrying out the three phases of its desegregation plan for the elementary schools of Richmond County.[3]

The order of the district court of January 13, 1972 is AFFIRMED as modified herein.

The mandate shall issue forthwith.

---

[3] The effect of the district court's plan, of course, is not to be ameliorated by such practices as segregation by race in the classroom. If the court receives evidence of such behavior, it should take further steps to enforce its decree. See **Moses v. Washington Parish School Board**, ____ F.2d ____ (5th Cir., 1972) [No. 71-2561, March 8, 1972].

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

APPENDIX II.

United States Court Of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK

May 2, 1972

TO ALL PARTIES LISTED BELOW

Re: No. 72-1211 — Acree, et al vs. County Board of Education of Richmond County vs. Drummond, et al

---

Gentleman:

You are hereby advised that the Court has today entered an order on behalf of Intervenors-Appellees-Cross-Appellants denying the Petition ( ) for Rehearing in the above case. No opinion was rendered in connection therewith. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By_____
DONNA BRADY
Deputy Clerk

/dlb

APPENDIX III.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

AUGUSTA DIVISION

CIVIL ACTION NO. 1179

ROBERT L. ACREE, et al.,
Plaintiffs

VS.

ANN GUNTER DRUMMOND, MASON CARTER CLEMENTS, S. LEE WALLACE, NADINE ESTROFF, DOUGLAS D. BARNARD, JR., ROBERT BEATTIE, BILL PERRY, DR. JAMES B. HATTAWAY, WILLIAM J. SALLEY, PATRICK G. SMITM, C. DAN COOK, EARL H. HENSLEY, WILLIAM B. KUHLKE, JR., GEORGE H. STREETER, GEORGE W. FISHER, FREDDIE CHILDRESS, LEONA NORTON, H. WELDON HAIR, HOWARD W. POTEET,
Plaintiffs in Intervention

VS.

COUNTY BOARD OF EDUCATION OF RICHMOND COUNTY, GEORGIA, ET AL.,
Defendants

ORDER

This case has been around since 1964. I came into it in the Fall of 1968.

At that time a freedom of choice plan was in effect in Richmond County schools. The total enrollment of white and black children in 1967-1968 was

approximately 35,750 students. Of 12,250 Negro students in the school population 5.5% chose to attend previously all-white schools. With one exception no white student had exercised freedom of choice to attend a previously all-black school.

Judge Scarlett held hearings in the Spring of 1968 on a motion by plaintiffs to adjudge the School Board in contempt and for summary judgment. He denied such relief. On appeal the Fifth Circuit reversed that ruling. See 399 F.2d 151. The appellate court said:

> ". . . we think it quite appropriate to point to the fact on the undisputed statistics presented to us it is clear that, with respect to the Richmond County Board of Education, a plan of desegregating the schools, generally known as 'the freedom of choice' plan has not worked. It has not produced a unitary school system in which there are no longer Negro schools and white schools, generally known and recognized by all as such. Under these circumstances, it becomes the duty of the respondent Board, not only under the Supreme Court decisions above referred to, but under our Jefferson decree, to take additional important and effective steps."

After the ruling was handed down the Fifth Circuit Court of Appeals assigned the case to me. A hearing was held at Augusta in December, 1968. I said that freedom of choice was impermissible. It had not worked. The Supreme Court had made this clear in **Green v. County School Board of New Kent County,** 391 U.S. 430; 88 S.Ct. 1689, 20 L.Ed2d 716 where the highest Court ruled that freedom of choice must be an effective device promising "meaningful and immediate progress toward disestabilshing state-imposed segregation." The Court said that "The burden

on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now."

I did not rule out freedom of choice altogether but stated that I would "give consideration to a plan formulated by the Board which combines automatic assignment of pupils within designated geographical zones and a limited freedom of choice of schools." See **Acree v. County Board of Education of Richmond County, Georgia**, 294 F. Supp. 1034. I directed that a zone or attendance area system be put into effect for the 1969-1970 school year.

On June 16, 1969, a hearing on the Board's plan was held at Augusta. Plaintiffs objected to it **in toto**. On July 14, 1969, I approved the plan presented as a temporary expedient. See 301 F. Supp. 1285. I pointed out:

> "The decisions of the Court of Appeals for the Fifth Circuit say that geographic zones are acceptable only if they tend to disestablish rather than reinforce the dual system of segregated schools. **Davis v. Board of School Commissioners of Mobile County**, 393 F.2d 690; **United States of America v. Greenwood Municipal Separate School District**, 406 F.2d 1086 (Feb. 4, 1969); **Henry v. Clarksdale Municipal Separate School District**, 409 F.2d 682. A school board must strive for promotion of desegregation and 'conscious effort should be made to move boundary lines and change feeder patterns which tend to preserve segregation.' See 393 F.2d at 694."

I further stated:

> "I think the wisest thing to do at this time, certainly the most expedient, is to approve temporarily the Board's new zone system and permit

same to go into effect at the beginning of the coming (1969-70) school year. We will soon thereafter be able to judge its effects. Because of possible constitutional infirmities of the zoning plan it will not be permanent and this is not a final order."

My Order of July 16, 1969, directed the School Board and Superintendent to apply immediately to the Office of Education, H.E.W., for professional counselling and assistance looking to development of a satisfactory and legal plan at an early date.

Before such a plan could be developed and presented the plaintiffs filed an appeal to the Court of Appeals for the Fifth Circuit. This was in March, 1970. On July 1st of that year that Court remanded the case. See 443 F.2d 1360. The higher Court said:

> "Having examined the record and the briefs of counsel in the above styled and numbered cause, this Court is left with a very definite and indelible impression — the Richmond County, Georgia public schools are racially identifiable, both as to the faculty and the composition of the respective student bodies. If there is any hope remaining for the Richmond County public schools to operate as a unitary system by the commencement of the new school year — prompt and immediate action is required."

In compliance with the Order by the Fifth Circuit a hearing was held and evidence introduced on July 30, 1970. On August 3rd I approved a plan recommended by Health, Education and Welfare which I modified to include additional pairing. It was essentially a neighborhood plan. The Fifth Circuit had gone along with something similar in the case of Ellis v. Board of Public Instruction of Orange County,

Florida, 423 F.2d 203. I took that route. The plan in question was to be implemented at the 1970-1971 school year.

My Order of August 3, 1970, in the **Acree** case was appealed to the Fifth Circuit. Meanwhile, the "busing" and racial ratio cases, including **Swann v. Charlotte-Mecklenburg Board of Education** had reached the Supreme Court of the United States. The Court of Appeals held its ruling in abeyance pending a decision in **Swann** and the other cases. It was handed down by the Supreme Court on April 20, 1971. See 402 U.S. 1-48. That decision made it clear (I quote the syllabus in **Swann**) that:

(a) While the existence of a small number of one-race, or virtually one-race, schools does not in itself denote a system that still practices segregation by law, the court should scrutinize such schools and require the school authorities to satisfy the court that the racial composition does not result from present or past discriminatory action on their part.[1]

(b) A student assignment plan is not acceptable merely because it appears to be neutral, for such a plan may fail to counteract the continuing effects of past school segregation. The pairing and grouping of noncontiguous zones is a permissible tool.

(c) The District Court's conclusion that assignment of children to the school nearest their home serving their grade would not effectively dismantle the dual system is supported by the record, and the reme-

[1] The Fifth Circuit has been telling us for years that "If in a school district there are still all-Negro schools or only a small fraction of Negroes enrolled in white schools . . . then as a matter of law the existing plan fails to meet constitutional standards established in **Green**." **Adams v. Mathews**, 403 F.2d 181.

dial technique of requiring bus transportation as a tool of school desegregation was within that court's power to provide equitable relief.

On July 1, 1971, the Court of Appeals for this Circuit disapproved the plan which this Court had approved in July, 1970, to be put into effect during the current school year. It remanded the case, stating:

> "The judgment of the district court as it relates to student and faculty assignment is vacated and the case is remanded with direction that the district court require the school board forthwith to constitute and implement a student and faculty assignment plan that complies with the principles established in **Swann v. Charlotte-Mecklenburg Board of Education,** 1971, ___ U.S. ___, ___ ___ S.Ct. ___ ___ L.Ed.2d ___, 39 Law Week 4437; **Carter v. West Feliciana Parish School Board,** 5 Cir., 1970, 432 F.2d 875, and **Singleton v. Jackson Municipal Separate School District,** 5 Cir., 1970, 419 F.2d 1211, insofar as they relate to the issues presented in this case."

The Court of Appeals has said that the prevailing system is a dual and an unconstitutional one. The racial statistics bear this out beyond all doubt. They reveal that in the elmentary schools during the 1970-1971 year seventeen were predominantly white and nine predominantly black.[2] There were four all-black elementary schools and one all-white. In eleven elementary schools the minority attendance was 5% or less of the whole and in three other schools the minority ratio was 10% or less of the entire school population..[3] On the secondary school level in 1970-

[2] I have used an 85% ratio as illustrating a predominantly white or predominantly black school.

[3] For example, at Southside this year there are 680 students of whom 8 are black.

1971, out of seventeen schools there was one all-black and two 99% black schools. There were six predominantly white schools in which the Negro ratio was less than 10% and two predominantly black schools with an attendance by white students of 6% or less. Two other secondary schools had a white ratio of 88% of the school population.

The current school year has produced inevitably (since the same plan is in effect) the same segregated picture. The projected attendance indicated that there are forty-one schools in which white students predominate. They have a total enrollment of 24,721 of whom 20,648 are white and 4,073 are black. In eighteen black schools in the system which have a total enrollment of 12,941 there are 360 white students (2.8%).

Following the decision of the Circuit Court of Appeals on July 1, 1971, I promptly ordered the Board to present a student and faculty assignment plan to this Court not later than July 21, 1971. I assigned a hearing on it for July 28th. Subsequently, upon oral request I extended to August 26th the time for presentation of such a plan. A hearing was held on that date.

To my amazement, the H.E.W. officials did not show up at the August 26, 1971, hearing. Without notice or excuse and at whose behest I do not know they did a disappearing act. The Board's behavior was no less contemptible. They passed the buck to the Superintendent of Schools, who, no doubt under instructions, presented a "plan" to the Court on behalf of the Board. What that individual did recommend does not surprise me in the light of his statement to this Court at the hearing held in Augusta on Decem-

ber 16, 1971. I inquired of him what plan he would suggest to the Court for the integration of the school system and his reply was, "Freedom of Choice." The plan presented by the School Superintendent at the "hearing" on August 26th last was to keep the school zones as they were except for two or three minor changes as to boundaries. One of them would have transferred about 100 white students to an all-black high school. This plan, so learned counsel for the Board informed me, made the system a unitary one, if it was not already such.

In **Acree v. County Board of Education of Richmond County**, 399 F.2d 151, the Court of Appeals said: "We think it not necessary to do more than call the attention of the respondent here to the extremely important obligation which is once more placed on the Board to assume its full responsibility to do all that is reasonably feasible, and **now**, to bring an end to the dual system of white and Negro schools in Richmond County." The Richmond County Board and its Superintendent have abdicated their responsibility. They have been contemptuous and intransigent. They have chosen to ignore the Constitution and the courts. Apparently, they, together with a segment of the population of Richmond County, deem themselves above and beyond the law. The Fourteenth Amendment is not to apply to those who find it not to their liking.

At the conclusion of the August hearing I stated that this Court would employ its own experts at the Board's expense to do what it and the school officials refused to do in the way of devising a plan of desegregation. Five days later the Court obtained the services of two well-known educators, experienced in desegre-

gation planning, Dr. J. Howard Munzer and Myrl G. Herman of the faculty of Rhode Island College.

Alternative plans were presented in the Munzer-Herman suggestions which were filed in this Court on September 27, 1971. The several Plans do not set out to establish any set numerical ratio of blacks to whites. However, through clustering and pairing it achieves a not dissimilar result.

Four elementary school plans are proposed. Plan I involves an unecceptable minimum amount of integration. Plan II involves more desegregation and Plan III (which I am adopting) even more. Plan IV would provide for maximum desegregation embraced and involved all but two elementary schools.

Two plans were presented for desegregation of the secondary schools. The plan is the same for the following schools: Josey, Murphey, Butler, Tutt, Langford, Richmond Academy and Laney. Under both Plan I and Plan II at the secondary level the schools mentioned would house the following grades.

Josey — Grades 8-9
Murphey — Grade 10
Butler — Grades 11-12
Tutt — Grades 8-9
Langford — Grades 8-9
Richmond Academy — Grades 11-12
Laney — Grade 10

In both Plan I and Plan II Tubman will house grade 8 and Johnson grade 9. However, under Plan I Tubman would have 511 students, 50% black, and Johnson would have 492 students, 45% black, whereas under Plan II Tubman has 461 students, 45% black,

and Johnson has 442 students, 39% black. The basic difference in the two secondary school Plans is that Plan I does not involve Sandbar Ferry or Sego whereas under Plan II these two schools are paired in such a way that Sandbar Ferry is grade 8 and Sego is grade 9.

After the plans were filed, I asked the parties for their analysis, comments and criticisms. The plaintiffs complained, among other things, that presently all-black Laney and Josey were reduced in status from graduating high schools and that this was not done in the case of any predominantly white senior high school.

The Board's response was of expected quality and content. It raises every carping, contumacious objection conceivable. It is a mishmash and embranglement of letters from individual members of the Board, the Superintendent and principals opposing desegregation of the system. There are resolutions, letters, speeches, newspaper clippings, et cetera. The response contributes less than nothing to the difficult problem the Board faced but fled.

Meanwhile, in October, 1971, I permitted a group of white parents to intervene who are opposed to busing though they say they are not opposed to integration **per se.** I will add that if there is any way to dismantle a dual school system, and the Richmond County Board perpetuated one long after the 1954 decision in **Brown v. Board of Education,** 347 U.S. 483, I am not aware how the constitutional imperative can ever be achieved without substantially increasing the transportation of students.

At my suggestion, the Intervenors presented a plan for consideration. It is entitled "Quality Education Plan for the People of Richmond County, Georgia." The plan is nothing more than Freedom of Choice both for students and faculty. Since the Intervenors have a right of appeal from this Order the higher court can enlighten us as to my evaluation of the "plan" proposed. Anyone who has even casually examined the decisions of the United States Supreme Court and of the Court of Appeals for this Circuit must know that choice plans are not constitutionally acceptable in a case such as this. In fact, the latter Court said exactly as much concerning the Richmond County system. See 399 F.2d 152.

On October 8, 1971, Dr. Munzer and Mr. Herman returned to Augusta to confer with the Court concerning the proposed desegregation plans. On the same day, with counsel and the Superintendent of Schools present, the plans were explained and discussed by the experts in the courtroom.

A full evidentiary hearing was held on December 16-17, 1971, for the purpose of considering a plan and for hearing evidence which the Intervenors desired to offer in opposition thereto. Witnesses for the Intervenors testified as to the effect of the Munzer-Herman plans on the R.O.T.C. program and on the exceptional children and model reading programs. The Director of Transportation stated that the Richmond County school system has 97 buses, including four assigned to special education. Eighty-three operate daily and there are 10 spare buses. In the last school year more than 12,000 students of a total of 34,619 were bussed. It was estimated that under the proposed plan 27 new

buses would be required at a cost of $12,400 each with an annual operational cost of $5,000 per bus.[4] Under Plan III, 5,681 additional elementary students would be transported. On the secondary level, Plan I contemplates bussing of 1,644 additional high school and junior high students. Plan II (secondary) calls for the transportation of 2,150 more students than are now being bussed. The estimates of increased transportation needs are possibly over-estimated by Dr. Munzer and Mr. Herman.

Counsel requested the Court to delay implementation of any plan pending discussions among the parties as to devising one (particularly on the secondary school level) which would be satisfactory. I granted a twenty-day extension for that purpose. That period has passed without any agreement being reached. Of course, in any event, the parties would not be permitted to stipulate away the mandate of the Constitution as to establishment of a unitary school system — one in which there are neither white nor black schools, just schools.

On July 1, 1971, the Fifth Circuit ordered that this Court require the Richmond County School Board "forthwith" to constitute and implement a constitutional student assignment plan. That means now, at once, without delay or interval. Because of the Board's wilful failure to carry out its constitutional duty the mandate of the higher Court could not be complied

[4] The same objection as to cost of increased transportation was made in the Savannah case. With staggered bus schedules, the increased needs have been handled (though with difficulty) by the existing equipment. The Chatham County system has approximately the same number of buses as Richmond County and about the same enrollment.

with. To obviate the system being closed down indefinitely I permitted the carrying on of a dual system at the beginning of the year. It is still in effect.

Last June I handed down an Order which fully integrated the secondary schools in the Chatham County system (with one necessary exception.). I delayed action on the elementary level as the Board wished more time and had not been able to agree on a plan. My decision was appealed and the ruling reversed. This Court was instructed to "forthwith" desegregate the elementary as well as secondary schools. This was done by the Court early in September, 1971. The situation in the Chatham County school case differs only from the Richmond County case in that the former involved the beginning of a school year and the latter the middle of such a year.

I realize that February is a poor time to revolutionize a school system. Significant educational problems are especially involved in massive changes in student populations of senior high schools during the academic year. Student schedules have already been planned for the year. Athletic programs have been developed and implemented. Seniors have spent one half of the year in present locations and have planned senior year activities, including ordering rings and yearbooks.

But a start must be and will be made. It will commence with certain elementary schools and will be effectuated in three phases. Phase One of Plan III proposed by the Court's experts will be implemented not later than February 15, 1972. The initial implementation will apply to two clusters of elementary schools represented by Zone A (Telfair, Evans, Milledge and

Houghton) and by Zone D (White, Wilkerson Gardens and Bungalow Road elementary schools). I will comment subsequently on the closing of Houghton elementary.

Phase Two will be implemented on or before March 15, 1972. This Phase involves Zones E and I under Plan III. The elementary schools affected are Jenkins and Fleming which will be paired and Griggs and Southside which will likewise be paired on or before March 15th next.

Plan III as related to other elementary schools in the system will be implemented on September 1, 1972.

Below is reviewed the effect of Plan III on the elementary schools with special relation to pupil population and available classroom space.

PHASE ONE, PLAN III

ELEMENTARY SCHOOLS

Zone A

At the evidentiary hearing on December 16, 1971, objections were raised by the Intervenors to the closing of Houghton elementary as proposed in each of the four elementary plans involving Zone A. Opponents thereof did not believe that the three other elementary schools in the Zone (Evans, Telfair and Milledge) would be capable of housing both regular classes and the special education classes, particularly the special education pupils at Evans.

An analysis of pupil population and available space in Zone A is set out below. It indicates that there is adequate space at Telfair, Evans and Milledge for all pupils, including special education children.

	Pupils per Plan	Grade	Class Room Needs	Special Ed. For 1971	Rms. Needed Plan and Sp. Ed. '71	Rooms Avail-able	Rooms +/—
Telfair	431	6-7	17	31-2	19	19	0
Evans	433	4-5	17	72-11	28	23	—5
Milledge	658	1-3	26	0-0	26	31	+5

As appears in the above table, there is a shortage of classrooms at Evans Elementary should no special education children be moved from that school. There are at least two solutions to this problem. Solution one would require the movement of five special education classes from Evans to Milledge. Solution two would call for movement of the fourth grade from Evans to Milledge, that is to say, the fourth grade as presented in the Munzer-Herman Plan III.

With respect to solution one, no change from Plan III as originally presented is required other than the movement of the special education children as referred to above.

Under the second solution, the following attendance results would obtain:

Telfair	Milledge			Evans		
	Grades	W	B	Grades	W	B
Same as in original Plan	1	153	91	5	126	86
	2	154	91			
	3	102	67			
	4	121	100			
		530	349			
	Total		879	Total		212
	Percentage of Blacks 38.5%			Percentage of Blacks 40.6%		

The Court leaves to the Board of Education (or Superintendent) the matter of determining whether Houghton Elementary should or should not be closed. If it is closed (and the evidence satisfies the Court that it is substandard) solution one which involves no change from the Plan as originally presented as related to standard classrooms and grades seems preferable. If it should be determined not to close Houghton and if it should be included in Zone A along with Telfair, Evans and Milledge, the following distribution of pupils is indicated by the Plan:

	Telfair			Evans	
Grade	W	B	Grade	W	B
6	124	99	3	102	67
7	121	87			
	245	186			169
Total	431				
Percentage of Blacks	43.1%				39.5%

	Houghton			Milledge	
Grade	W	B	Grade	W	B
4	121	100	1	153	91
5	126	86	2	154	91
	247	186		307	182
Totals	433			489	
Percentage of Blacks	43.0%			37.2%	

	Telfair		Evans		Houghton		Milledge	
	Teach.	Child.	Teach.	Child.	Teach.	Child.	Teach.	Child.
Sp. Ed.	2	14	6	6	0	0	0	0
Rooms Avail.	19		23		22		31	
Rooms Needed	19		18		17		20	

Zone A presents no serious transportation problem. The distances are not great between the clustered schools.

Zone D

Under Plan III, Zone D, White, Wilkerson Gardens and Bungalow Road elementary schools are clustered. The Zone embraces a rather small geographical area and transportation distances are relatively short. There is no indication of space problems resulting from special education pupils.

The plan proposed for clustering of these three elementary schools in Zone D is adopted and will be implemented at the same time as Zone A, that is, on or before February 14, 1972. The pupil population in the four schools in Zone D as related to available space will be approximately as is shown in the original plan. It is iluustrated in the table below:

	Pupils per Plan	Grades	Class Room Needs	Sp. Ed. '71 Ch./ Tchr.	Rms. Needed Plan and Sp. Ed. '71	Rooms Avail.	Rooms* + or —
White	785	5-6	31	0-1	31**	31	0
Wilkinson Gardens	576	1-2	23	0-1	23**	24	+1
Bungalow Road	579	3-4	23	16-1	24	29	+5
					78	84	

*The last column shows the number of rooms in excess (+) if Plan III is implemented and if the special education population as of the Fall of 1971 does not move. The minus sign indicates room shortage.

**I assume that no classroom is needed since no grouping of special education children is indicated for these schools.

PHASE TWO, ELEMENTARY

Zone E

Phase Two of the implementation of Plan III is approved and adopted and will be implemented not later than March 15, 1972. This Phase relates to Zone E and Zone I.

Zone E is made up of Jenkins and Fleming elementary which will be paired. No problem exists in respect to special education pupils.

An analysis of pupil population and available pupil space in the pairing of Jenkins and Fleming appears below:

	Pupils per Plan	Grade	Class Room Needs	Sp. Ed. for '71 Ch./ Tchr.	Rms. Needed Plan and Sp. Ed. '71	Rooms Avail.	Rooms + or —
Jenkins	332	1-3	13	15-2	15	15	0
Fleming	320	4-7	13	22-2	15	32	+17

Zone I

Zone I involves the pairing of Griggs and Southside elementary schools. The transportation problem presents greater distances than Zones A, D or E. Griggs and Southside are located approximately 4.2 miles straight line distance from each other. The analysis of pupil population and available space indicates the following with respect to this Zone:

	Pupils per Plan	Grade	Class Room Needs	Sp. Ed. for '71 Ch./ Tchr.	Rms. Needed Plan and Sp. Ed. '71	Rooms Avail.	Rooms + or —
Griggs	463	5-6	18	17-2	20	21	+1
Southside	650	1-4	26	0-0	26	15	—11

As indicated by the above table, there is a shortage of eleven rooms at Southside. The school district data furnished by the Superintendent's office shows that Southside has fifteen rooms. This would give it a capacity of 375 pupils on the basis of 25 pupils per classroom. However, it is noted that at the present time the school has an enrollment of 675. It follows that there must be more than fifteen classrooms at Southside elementary. Plan III, Zone I, indicates a school population of 650 at Southside which is smaller than the present enrollment figure.

PHASE THREE, ELEMENTARY

The third and final phase of desegregation of the elementary schools in Richmond County involves Zones B, C, F, G, H, and the Alternative Zone outlined on page 45 of the original plan of desegregation. Phase Three will be fully implemented on September 1, 1972. I have deferred the desegregation of the schools in these zones until the beginning of the next school year and in doing so have taken into consideration the fact that the transposition from a dual system to a unitary system will involve adjustments of a major character and that it is impractical and unwise to convert the system overnight at mid-year.

Zones B, C and F in Plan Three present no space or special education problems. An analysis of pupil population and space availability in regard to the four Zones in question shows as follows:

Zone B

	Pupils per Plan	Grade	Class Room Needs	Sp. Ed. '71 Ch./ Tchr.	Rms. Needed Plan and Sp. Ed. '71	Rooms Avail.	Rooms + or —
Walker	932	5-7	38	43-3	41	43	+2
Lamar	411	1-3	16	10-1	17	23	+6
Monte Sano	544	3-4	22	0-0	22	23	+1
Lake F.Dr.	267	1-2	11	0-0	11	13	+2

Zone C

Collins	951	5-7	38	19-2	40	41	+1
Bayvale	684	1-3	27	0-0	27	29	+2
Copeland	554	3-4	22	0-0	22	23	+1

Zone F

	Pupils per Plan	Grade	Class Room Needs	Sp. Ed. '71 Ch./ Tchr.	Rms. Needed Plan and Sp. Ed. '71	Rooms Avail.	Rooms + or —
Craig	506	1-3	20	0-0	20	20	0
Hains	692	4-7	28	0-0	28	30	+2

Zone G

Zone G, Plan III, clusters Weed, Robinson and Merry elementary schools. An analysis of pupil population and available space in Zone G shows:

	Pupils per Plan	Grade	Class Room Needs	Sp. Ed. '71 Ch./ Tchr.	Rms. Needed Plan and Sp. Ed. '71	Rooms Avail.	Rooms + or —
Weed	143	5	6	0-0	6	12	+6
Robinson	294	6-7	18	40-4	22	16	—6
Merry	523	1-4	21	0-0	21	22	+1

No space or special education problems are involved in Zone G. A problem does exist which grows out of the need of six additional classrooms for special

education pupils at Robinson. Acceptable solutions include the following:

(1) Move 6 classes for special education to Weed Elementary School or

(2) Move Grade 6 to Weed Elementary School.

The Board of Education may adopt one or the other of these solutions.

Zone H

Zone H clusters Floyd, Garrett and National Hills elementary schools. Pupil population and available space analysis indicates the following as to Zone H:

	per Plan Pupils	Grade	Class Room Needs	Sp. Ed. '71 Ch./ Tchr.	Rms. Needed Plan and Sp. Ed. '71	Rooms Avail.	Rooms + or —
Floyd	309	6-7	12	0-0	12	23	+11
Garrett	466	3-5	19	20-3	22	20	—2
National Hills	305	1-2	12	0-0	12	14	+2

There is an indicated shortage of two classrooms at Garrett. Solutions for this problem include:

(1) The shifting of two special education classes to Floyd Elementary School or to National Hills.

(2) The shifting of Grade 5 from Garrett to Floyd Elementary School.

The Board of Education may adopt one or the other of these possible solutions.

ALTERNATIVE PLAN

(See pages 45 and 46 of original Munzer-Herman Plan)

The Alternative Plan includes Glenn Hills, Ter-

race Manor and Wheeless Road schools. The percentage of black pupils in Glenn Hills and Terrace Manor are high, averaging 48.1 per cent in the two schools. If these schools should be combined with Wheeless Road School which is predominantly white, the average percentage of black upils would be 34.2. There is presently a total enrollment of 1,684 pupils in the three schools and a capacity of 1,650 according to school data. Consequently, there is a need for two additional classrooms which, logically, would accommodate a class at Glenn Hill school and a class at Wheeless Road school.

The result of combining Glenn Hills, Terrace Manor and Wheeless Road schools according to an analysis of pupil population and available space is shown below:

	Pupils per Plan	Grade	Class Room Needs	Sp. Ed. '71 Ch./ Tchr.	Rms. Needed Plan and Sp. Ed. '71	Rooms Avail.	Rooms + or —
Terrace Manor	508	1-2	20	0-1	20	21	+1
Glenn Hills	340	3-4	13	0-0	14	13	—1
Wheeless Road	836	4-7	33	0-1	33	32	—1

SECONDARY SCHOOLS

The desegregation of the secondary school system in Richmond County presents the same difficulties that is experienced in any large urban school district. The problems stem not only from vestiges of State-imposed segregation but from the practice since 1954 of school boards perpetuating dual systems by build-

ing schools designed to draw either from the white or black school population, not from both. New schools have been erected with resulting preservation of a segregated system. By and large, the Negro schools lie in the heart of a densely populated black area of Augusta. White schools follow residential patterns. Lack of new and more strategically located middle grade schools compound the problem.

Irrespective of obstacles, the Fourteenth Amendment, as construed by federal courts, demands that the dual system now in existence be "wiped out root and branch" and "not tomorrow but now." However, you cannot in one day chop down and dig up the stump of a tree which rooted two centuries ago. Desegregation will be delayed on the secondary level until September 1, 1972.[5] It must be fully accomplished by that date and will be. As I stated on another occasion, it is phantasy approaching autism to think that the Constitution of the United States treats Augusta differently from other places where a dual system is the result of **de jure** school segregation. Richmond County is no different from 42 other school districts in the Southern District of Georgia in which desegregation is now an accomplished fact; admittedly with travail in certain cases.

Earlier in this Order, I referred to some of the difficulties of mid-year desegregation, particularly high schools. At this time and during the current school year it would be chaotic, if not impossible, to implement any major plan in respect to desegregation of secondary schools in Richmond County. More than

[5] Of course, in event of appeal and reversal of this Order the Board must be prepared to desegregate all schools during this year.

that, there is at present no plan before the Court upon which it can act. Dr. Munzer and Mr. Herman presented two alternative plans for desegregation of secondary schools but at the hearing on December 16th last the possibility was raised that there might be discrimination against the plaintiffs in that Josey and Laney High Schools, which are all-black or practically so, would no longer be graduating schools whereas none of the predominantly white senior high schools have been thus treated in the plans. I have asked that the experts suggest alternative plans as to the secondary schools in the Richmond County system dealing with that problem.

ORDER

(1) It is ordered and decreed that the desegregation of the elementary schools in the Richmond County system shall be in accordance with this Order. Defendants are directed promptly to take all necessary steps to the end that Plan III shall be implemented in the three phases described in this Order. No stay will be granted pending any appeal by any party from this Order.

(2) Responsibility as to implementation will be and is imposed upon the Board and the Superintendent of Schools and they are ordered to fully and timely implement Plan III for the elementary schools. If the Board does not act promptly in any case in which any discretionary authority is conferred upon it by this Order, the discretion in that respect will be exercised by the Superintendent and he is directed in any such instance to act and full responsibility is imposed upon him.

(3) Minor adjustments in the Plan may be made by defendants as to alternate assignments in the instance of special education classes provided that the desegregation levels outlined in the plans are maintained.

(4) The Superintendent of Schools shall file a report in writing with this Court on January 19, 1972, detailing what has been done by him and by the defendant Board since this Order was signed in preparing, planning and carrying out the implementation of Phase One and Phase Two of Plan III. Similar written reports shall be filed by him at the end of each successive three-day period after such date until further order of this Court.

(5) Meanwhile, the Court will continue to consider and to endeavor to formulate and develop a feasible and sound plan of desegregation for the secondary schools in the system. At the earliest practicable time an Order in that respect will be entered. The secondary school plan approved and ordered by the Court will be implemented by defendants on September 1, 1972.

(6) The defendant Board and the Superintendent will file in this Court within 15 days a report showing the total enrollment during the present school year in every school in the system and the number of blacks and whites in each such school. The report will also include information as to racial composition of faculty and staff in the schools.

(7) It is further ordered that the Board shall immediately review existing staff and faculty racial ratios and shall forthwith comply, on a system-wide

basis, with the provisions for "Desegregation of Faculty and Other Staff" as set forth in **Singleton v. Jackson Municipal Separate School District, et al.**, 419 F.2d 1211 (5 Cir.). The School Board is directed to file semi-annual reports during each school year similar to those required in **United States v. Hinds County School Board** (5 Cir.), 433 F.2d 611, 618.

(8) The pending motions filed by the plaintiffs for appointment of a receiver for the Richmond County system and for adjudging the defendants in contempt will be held in abeyance, at least for the present.

(9) The evidence at the hearing on December 16, 1971, indicates that there are numerous instances where pupils are attending schools in zones outside their actual residence. The Board, Superintendent and school officials are ordered promptly to undertake corrective measures in respect to boundary observance. A report in that respect shall be furnished not later than February 1, 1972.

(10) The motion for award of attorney's fees to plaintiffs' counsel is granted. The amount of the fee will be settled on affidavits or, if necessary, following a hearing on the subject.

(11) The defendant Board will, as a part of the costs in the case, pay the compensation and expenses of Messrs. Munzer and Herman for their services to this Court and same are assessed as costs against defendants.

This 13th day of January, 1972.

ALEXANDER A. LAWRENCE
Chief Judge, United States District Court
Southern District of Georgia

APENDIX IV

EDUCATION AMENDMENTS OF 1972, ENACTED JUNE 23, 1972

TITLE VIII—GENERAL PROVISIONS RELATING TO THE ASSIGNMENT OR TRANSPORTATION OF STUDENTS

Prohibition Against Assignment or Transportation of Students to Overcome Racial Imbalance

Sec. 801. No provision of this Act shall be construed to require the assignment or transportation of students or teachers in order to overcome racial imbalance.

Prohibition Against Use of Appropriated Funds For Busing

Sec. 802(a). No funds appropriated for the purpose of carrying out any applicable program may be used for the transportation of students or teachers (or for the purchase of equipment for such transportation) in order to overcome racial imbalance in any school or school system, or for the transportation of students or teachers (or for the purchase of equipment for such transportation) in order to carry out a plan of racial desegregation of any school or school system, except on the express written voluntary request of appropriate local school officials. No such funds shall be made available for transportation when the time or distance of travel is so great as to risk the health of the children or significantly impinge on the educational process of such children, or where the educational opportunities available at the school to which it is proposed that any such student be trans-

ported will be substantially inferior to those opportunities offered at the school to which such student would otherwise be assigned under a nondiscriminatory system of school assignments based on geographic zones established without discrimination on account of race, religion, color, or national origin.

(b) No officer, agent, or employee of the Department of Health, Education, and Welfare (including the Office of Education), the Department of Justice, or any other Federal agency shall, by rule, regulation, order, guideline, or otherwise, (1) urge, persuade, induce, or require any local education agency, or any private nonprofit agency, institution, or organization to use any funds derived from any State or local sources for any purpose, unless constitutionally required, for which Federal funds appropriated to carry out any applicable program may not be used, as provided in this section, or (2) condition the receipt of Federal funds under any Federal program upon any action by any State or local public officer or employee which would be prohibited by clause (1) on the part of a Federal officer or employee. No officer, agent, or employee of the Department of Health, Education, and Welfare (including the Office of Education) or any other Federal agency shall urge, persuade, induce, or require any local education agency to undertake transportation of any student where the time or distance of travel is so great to risk the health of the child or significantly impinge on his or her educational process; or where the educational opportunities available at the school to which it is proposed that such student be transported will be substantially inferior to those offered at the school to which such student would otherwise be assigned under a nondis-

criminatory system of school assignments based on geographic zones established without discrimination on account of race, religion, color, or national origin.

(c) An applicable program means a program to which the General Education Provisions Act applies.

Provision Relating To Court Appeals

Sec. 803. Notwithstanding any other law or provision of law, in the case of any order on the part of any United States district court which requires the transfer or transportation of any student or students from any school attendance area prescribed by competent State or local authority for the purposes of achieving a balance among students with respect to race, sex, religion, or socioeconomic status, the effectiveness of such order shall be postponed until all appeals in connection with such order have been exhausted or, in the event no appeals are taken, until the time for such appeals has expired. This section shall expire at midnight on January 1, 1974.

Provision Authorizing Intervention in Court Orders

Sec. 804. A parent or guardian of a child, or parents or guardians of children similarly situated, transported to a public school in accordance with a court order, may seek to reopen or intervene in the further implementation of such court order, currently in effect, if the time or distance of travel is so great as to risk the health of the student or significantly impinge on his or her educational process.

Provision Requiring That Rules of Evidence Be Uniform

Sec. 805. The rules of evidence required to prove

that State or local authorities are practicing racial discrimination in assigning students to public schools shall be uniform throughout the United States.

Application of Proviso of Section 407(a) of The Civil Rights Act of 1964 To The Entire United States

Sec. 806. The proviso of section 407(a) of the Civil Rights Act of 1964 providing in substance that no court or official of the United States shall be empowered to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards shall apply to all public school pupils and to every public school system, public school and public school board, as defined by title IV, under all circumstances and conditions and at all times in every State, district, territory, Commonwealth, or possession of the United States, regardless of whether the residence of such public school pupils or the principal offices of such public school system, public school or public school board is situated in the northern, eastern, western, or southern part of the United States.

APPENDIX V

SUGGESTED PLANS

related to

DESEGREGATION OF THE PUBLIC SCHOOLS

of

AUGUSTA AND RICHMOND COUNTY, GEORGIA

Prepared for Judge Alexander Lawrence

by

J. Howard Munzer

and

Myrl G. Herman

THE PUPIL DESEGREGATION PLANS

This report contains four plans for desegregating the elementary schools of Richmond County and two plans for desegregating the secondary schools. For purposes of clear presentation the design for these plans follows a uniform pattern. Each plan is noted by Roman numeral. Composite zones constituting each plan are labeled by capital letters. For example, Plan I contains five combinations of attendance zones. The combined zones are denoted as A, B, C, D and E. Each zone is organized separately. The information pertaining to each zone is as follows:

1. The zone designation.
2. Present enrollment data of schools in the zone.
3. Additional data on school capacities and transportation.

4. The proposed allocation of pupils to schools and the effects on composition of enrollment.

5. An estimate of transportation demanded to implement the proposed zone.

6. Comments when needed.

7. Two copies of this report contain maps for each plan. The maps indicate the various zoning combinations which comprise the particular zones.

The four plans for the elementary schools are organized to present four alternative levels of desegregation. The fundamental basis for each plan is explained below. It should be noted that in all four plans the Houghton School is closed because of its age and poor condition.

Plan I.

Plan I is a minimal plan which emphasizes desegregation of schools on the borders of the Black concentration in Augusta. In the main, Black schools are combined with contiguous and adjacent White schools. In only one case, a Black school is zoned with two nearby schools. This plan affects the enrollments of 16 schools and develops a minimum of transportation problems related to time and distance. This plan is not only reasonable and feasible but it can be easily organized and administered.

Plan II.

Plan II extends the amount of desegregation to moderate levels. The number of schools affected is increased to 21. Transportation is increased with

attending increases in times and distances. However, it is a reasonable and feasible plan which could be easily organized and administered.

Plan III.

Plan III results in a relatively small increase in transportation over Plan II. Its main feature is the effect on Floyd School which is an inner Black school. The total number of schools affected is 26. This plan is considered reasonable and feasible. It results in rather extensive changes in the total school system and therefore poses a more complicated administrative problem.

Plan IV.

Plan IV results in virtually complete desegregation. One all-White and one all-Black school remain. However, 29 out of 38 elementary schools fall within the 30 to 50% range of per cent Black. The transportation is extensive and distances are approaching undesirable levels. Zone J, for example, probably requires more than 45 minutes transportation time each way for children traveling between Hornsby and either Hains or Fleming. This plan can be justified as reasonable and feasible if transportation time of about one hour each way is acceptable.

ELEMENTARY SCHOOLS
COMBINED ZONE INFORMATION
PLAN III ZONE A

Per Cent Black 40.8

Schools	Totals By Race W	B	School
Telfair	4	242	246

Evans	90	2	92
Milledge	667	105	772
Houghton	140	272	412
Totals	901	621	1522

Data.

1. School Capacities:

Telfair	19 classrooms	475 pupils
Evans	23	575
Milledge	31	775
Houghton	22	550

2. Total presently transported: 120.

Pupil Allocation Plan.

Telfair

Grade	W	B
6	124	99
7	121	87
	245	186
	431	
	43.1% B	

Milledge

Grade	W	B
1	153	91
2	154	91
3	102	67
	409	249
	658	
	37.8% B	

Evans

Grade	W	B
4	121	100
5	126	86
	247	186
	433	
	43.0% B	

Transportation Estimate

Telfair

To Evans	19
To Milledge	86

Milledge	
To Evans	210
To Telfair	205
Evans	
To Milledge	15
To Telfair	10
Houghton	
To Telfair	77
To Evans	120
To Milledge	185
Evans (internal)	15
Total Transportation estimate (maximum)	952

ELEMENTARY SCHOOLS

COMBINED ZONE INFORMATION

PLAN III ZONE B

Per Cent
Black 46.1

Schools	Totals By Race W	B	School
Walker	0	799	799
Lamar	345	131	476
Monte Cano	528	27	555
Lake F. Dr.	289	35	324
Totals	1162	992	2154

Data.

1. School Capacities:

Walker	43 classrooms	1075 pupils
Lamar	23	575
Monte Sano	23	575
Lake Forest Dr.	13	325

2. Total presently transported: 546

Pupil Allocation Plan.

Walker

Grade	W	B
5	180	121
6	162	145
7	175	149
	517	415
	932	
	44.5% B	

Lamar

Grade	W	
1*	40	2
2⁰	127	15
3*	49	1
	216	19
	411	
	47.4% B	

Monte Sano

Grade	W	B
3#	122	91
4	174	157
	296	248
	544	
	45.6% B	

Lake F. Dr.

Grade	W	
1#	102	12
2†	31	
	133	13
	267	
	50.0% B	

*Lamar pupils only
#Less Lamar
†Lake F. Dr. only
⁰all but Lake F. Dr.

Transportation Estimates.

Walker

To Lamar (2) _____ 12
To Monte Sano (3,4) _____ 21
To Lake Forest Dr. (1) _____ 11

Lamar

To Walker (5,6,7) _____ 15
To Monte Sano _____ 5

Monte Sano

To Walker	244
To Lamar	73
To Lake Forest Dr.	60

Lake Forest Dr.

To Walker	139
To Monte Sano	95
Lamar (internal)	51
Monte Sano (internal)	91
Lake Forest Dr. (internal)	45

Total transportation estimate (maximum) 1462

ELEMENTARY SCHOOLS

COMBINED ZONE INFORMATION

PLAN III ZONE C

Per Cent
Black 44.4%

Schools	Totals By Race W	B	School
Collins	0	928	928
Bayvale	618	42	660
Copeland	598	3	601
Totals	1216	973	2189

Data.

1. School Capacities:

Collins	41 classrooms	1025 pupils
Bayvale	29	725
Copeland	23	575

2. Pupils presently transported: 574.

Pupil Allocation Plan.

Collins

Grade	W	B
5	172	136
6	174	141
7	166	162
	512	439
	951	
	46.2% B	

Bayvale

Grade	W	B
1	177	131
2	172	129
3*	50	25
	399	285
	684	
	41.7% B	

Copeland

Grade	W	B
3#	134	105
4	171	144
	305	249
	554	
	44.9% B	

*25 each from SW corner of Collins attendance area.
SE corner of Copeland attendance area.
#remaining third graders

Transportation Estimate.

Collins

To Bayvale	269
To Copeland	236

Bayvale

To Collins	263
To Copeland	163

Copeland

To Collins	265
To Bayvale	181

Bayvale (internal)	136
Copeland (internal)	47
Total transportation estimate (maximum)	1560

ELEMENTARY SCHOOLS

COMBINED ZONE INFORMATION

PLAN III ZONE D

Per Cent
Black 43.7%

Schools	Totals By Race W	B	School
White		710	710
W. Gardens	454	131	585
Bungalow Rd.	638	7	645
Totals	1092	848	1940

Data.

1. School Capacities:

White	31	classrooms	775 pupils
W. Gardens	24		600
Bungalow Rd.	29		725

2. Pupils presently transported: 544

Pupil Allocation Plan.

White			W. Gardens		
Grade	W	B	Grade	W	B
5	162	112	1	157	134
6	138	119	2	156	129
7	148	106			
	448	337		313	263
	785			576	
	42.9% B			45.7% B	

Bungalow Rd.

Grade	W	B
3	170	118
4	161	130
	331	248
	579	
	42.8% B	

Transportation Eestimates.

White

To W. Gardens	15
To Bungalow Rd.	20

W. Gardens

To White	16
To Bungalow Rd.	14

Bungalow Rd.

To White	26
To W. Gardens	16
Bungalow Rd. (internal)	10
W. Gardens (internal)	6
Total transportation estimate (maximum)	127

ELEMENTARY SCHOOLS

COMBINED ZONE INFORMATION

PLAN III ZONE E

Per Cent
Black 44.0%

Schools	By Race W	By Race B	Totals School
Jenkins	7	286	293
Fleming	358	1	359
Totals	365	287	652

Data.

1. School Capacities:

Jenkins	15 classrooms	375 pupils
Fleming	32	800

2. Pupils presently transported: 163.

Pupil Allocation Plan.

Jenkins			Fleming		
Grade	W	B	Grade	W	B
1	64	49	4	41	51
2	62	51	5	30	26
3	71	35	6	40	50
			7	57	25
	197	135		168	152
	332			320	
	40.7% B			47.5% B	

Transportation Estimate.

Jenkins to Fleming	155
Fleming to Jenkins	194
Jenkins (internal)	22
Fleming (internal)	41
Total transportation estimate (maximum)	412

ELEMENTARY SCHOOLS

COMBINED ZONE INFORMATION

PLAN III ZONE F

Per Cent
Black 30.2%

Schools	By Race W	B	Totals School
Craig		346	346
Hains	836	16	852
Total	836	362	1198

Data.

1. School Capacities:

Craig	20 classrooms	500 pupils
Hains	30	750

2. Total presently transported: 0

Pupil Allocation Plan.

Craig			Hains		
Grade	W	B	Grade	W	B
1	112	60	4	126	51
2	114	49	5	127	47
3	117	54	6	129	56
			7	111	45
	343	163		493	199
	506			692	
	32.2% B			28.7% B	

Transportation Estimates.

Craig to Hains	189
Hains to Craig	349
Total transportation estimate (maximum)	538

ELEMENTARY SCHOOLS

COMBINED ZONE INFORMATION

PLAN III ZONE G

Per Cent Black 38.8%

Schools	By Race W	By Race B	Totals School
Weed	63	160	223
Robinson	40	121	161
Merry	485	91	576
Totals	588	372	960

Data.

1. School Capacities:

Weed	12 classrooms	300 pupils
Robinson	16	400
Merry	22	550

2. Pupils presently transported: 122

Pupil Allocation Plan.

Weed

Grade	W	B
5	90	53

143
37.0% B

Robinson

Grade	W	B
6	90	55
7	92	57
	182	112

294
38.1% B

Merry

Grade	W	B
1	72	70
2	75	52
3	78	46
4	91	39
	316	207

523
39.6% B

Transportation Estimate.

Weed
To Merry 42

Robinson
To Merry 161

Merry	
To Weed	88
To Robinson	168
Merry (internal)	45
Total transportation estimate (maximum)	504

ELEMENTARY SCHOOLS
COMBINED ZONE INFORMATION
PLAN III ZONE H

Per Cen
Black 43.1%

Schools	Totals By Race W	B	School
Floyd		461	461
Garrett	381	5	386
National Hills	233		233
Totals	614	466	1080

Data.

1. School Capacities:

Floyd	23 classrooms	575 pupils
Garrett	20	500
National Hills	14	350

2. Pupils presently transported: 125

Pupil Allocation Plan.

Floyd			Garrett		
Grade	W	B	Grade	W	B
6	98	66	3	92	76
7	89	56	4	88	63
			5	92	55
	187	122		272	194
	309			466	
	40.0% B			41.6% B	

National Hills

Grade	W	B
1	70	74
2	85	76
	155	150

305

47.2% B

Transportation Estimate.

Floyd	
To Garrett	191
To National Hills	150
Garrett	
To Floyd	118
To National Hills	80
National Hills	
To Floyd	71
To Garrett	61
Garrett (internal)	42
Total transportation estimate (maximum)	713

ELEMENTARY SCHOOLS

COMBINED ZONE INFORMATION

PLAN III ZONE I

Per Cent
Black 40.1%

Schools	Totals By Race W	B	School
Griggs	0	438	438
Southside	665	10	675
Totals	665	448	1113

Data.

1. School Capacities:

Griggs	21 classrooms	525 pupils
Southside	15	375

2. Total presently transported: 196

Pupil Allocation Plan.

Griggs			Southside		
Grade	W	B	Grade	W	B
5	97	41	1	91	76
6	91	73	2	99	67
7	90	71	3	98	62
			4	99	58
	278	185		387	263
	463			650	
	40.0% B			40.5% B	

Transportation Estimates.

Griggs to Southside	255
Southside to Griggs	278
Southside (internal)	99
Total transportation estimate (maximum)	632

ALTERNATE ELEMENTARY PLAN FOR TERRACE MANOR, GLENN HILLS AND WHEELESS ROAD

(May Be Used With Plans II, III and IV)

Schools	Totals By Race W	B	School
Terrace			
Manor	243	255	498
Glenn Hills	214	169	383
Wheeless Road	651	152	803
Totals	1108	576	1684

Data.

1. School Capacities:

Terrace Manor	21 classrooms	525 pupils
Glenn Hills	13	325
Wheeless Rd.	38	800

2. Pupils presently transported: 736.

Pupil Allocation Plan.

Terrace Manor

Grade	W	B
1	169	85
2	180	74
	349	159
	508	
	31.3% B	

Glenn Hills

Grade	W	B
3	164	79
4	50	47
	214	126
	340	
	37.0% B	

Wheeless Road

Grade	W	B
4	98	21
5	145	101
6	160	78
7	142	91
	545	291

836

34.8% B

Transportation Estimate.

Terrace Manor

To Glenn Hills _____ 0

To Wheeless Road _____ 30[illegible]

Glenn Hills

To Terrace Manor _____ 2[illegible]

To Wheeless Road _____ 0

Wheeless Road

To Glenn Hills _____ 11[illegible]

To Terrace Manor _____ 31[illegible]

Terrace Manor (internal) _____ [illegible]

Glenn Hills (internal) _____ [illegible]

Wheeless Road (internal) _____ 12[illegible]

Total transportation estimate (maximum) _____ 12[illegible]

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1972

No.———

ANN GUNTER DRUMMOND, ET AL.,
Petitioners

vs.

ROBERT L. ACREE, ET AL.,
Respondents

vs.

COUNTY BOARD OF EDUCATION OF RICHMOND COUNTY, GEORGIA, ET AL.,
Respondents

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF PURSUANT TO RULE 24(5) OF THIS COURT

NOW COMES the petitioners and move the Court for leave to file a supplemental brief in support of its petition for writ of certiorari pursuant to Rule 24(5) of the Supreme Court of the United States.

Respectfully submitted
O. TORBITT IVEY, JR.
Suite 500
The 500 Building
Augusta, Georgia 30902

Attorney for Petitioners

September 1, 1972
HARRIS, CHANCE & McCRACKEN

TABLE OF CONTENTS

Introduction 1

Summary of Argument 2

Argument 4

Part I: Proceedings Subsequent to Petition for Certiorari 4

Part II: Recent Case Law 24

Part III: Recent Legislative Provisions 35

Part IV: Education Amendments of 1972, Title VIII, Sections 803-806 47

Part V: Factual Analysis of Court Ordered Plan 68

Conclusion 83

Certificate of Service 86

INDEX OF AUTHORITY

Table of Cases

Acree v. Drummond, 336 F.Supp. 1275 (S.D. Ga. 1972) 2, 26, 33, 68, 70

Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969) 66

Anderson v. Wilson, 289 U.S. 20 (1932) 62

Antonio v. Greenhow, 107 U.S. 769 (1883) 56

Assessors v. Osborne, 9 Wall. 567 (1869) 50

Bank of Columbia v. Okeley, 4 Wheat. 235 (1819) 56

Bradley v. Milliken, et al., ___ F.2d ___ (6th Cir. 1972), argued August 24, 1972 8

Bradley v. The School Board of The City of Richmond, Virginia, ___ F.2d ___ (4th Cir. 1972), decided June 5, 1972 69

Brown v. Board of Education, 347 U.S. 483 (1954) 44, 66, 69

Brown v. Board of Education, 349 U.S. 294 (1955) 66

Calhoun v. Cook, ___ F. Supp. ___ (N.D. Ga. 1972) decided June 8, 1972 79

Carter v. West Feliciana Parish School Board, 432 F.2d 875 (5th Cir. 1970) 32

Cary v. Curtis, 3 How. 236 (1845) 51

Cisneros v. Corpus Christi Ind. Sch. Dist., ___ F.2d ___ (5th Cir. 1972) decided August 3, 1972 ..... 24, 26, 29, 32, 33, 79

Davis v. Board of Education of North Little Rock, Ark., 328 F. Supp. 1197 (E.D. Ark. 1971) 78

Davis v. Board of School Commissioners of Mobile County, 402 U.S. 31 (1971) 29, 30, 31, 32, 77

Drummond v. Acree, ___ U.S. ___ (1972), decided September 1, 1972 ..... 7, 9, 59, 60, 61, 64

Electric Storage Battery Co. v. Shimadzu, 307 U.S. 5 (1939) 62

Ex Parte McCardle, 7 Wall. 506 (1869) 51

Ex Parte Virginia, 100 U.S. 339 (1880) 52

F.H.E. Oil Co. v. C.I.R., 150 F.2d 857 (5th Cir. 1945) 45

Gibbons v. Ogden, 9 Wheat. 1 (1824) 53

Girouard v. U.S., 328 U.S. 61 (1946) 62

Goss v. Board of Education of City of Knoxville, Tenn., 444 F.2d 632 (6th Cir. 1971) 79

Helvering v. Griffiths, 318 U.S. 371 (1943) 65

Katzenbach v. Morgan, 384 U.S. 641 (1966) 52, 53

Keyes v. School District No. 1, Denver, Colorado, 445 F.2d 990 (10th Cir. 1971) 65

Kline v. Burke Construction Co., 260 U.S. 226 (1922) 49

Lockerty v. Phillips, 319 U.S. 182 (1943) 50

Mapp v. Board of Education of Chattanooga, ___ F. Supp. ___ (E.D. Tenn. 1972), decided August 12, 1972 ..... 7, 8

Mayor of Nashville v. Cooper, 6 Wall. 247 (1867) 50

McCulloch v. Maryland, 4 Wheat. 316 (1819) 53

Munn v. Illinois, 94 U.S. 132 (1876) 56

N.L.R.B. v. Fruit & Veg. Pck. & Whse., Loc 760, 377 U.S. 58 (1964) 10

Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) 10

Sheldon v. Sill, 8 How. 441 (1850) 49

Singleton v. Jackson Municipal Separate School District, 419 F.2d 1211 (5th Cir. 1970) 32

Spiegel's Estate v. Commissioner of Internal Revenue, 335 U.S. 632 (1949) 10, 62

State of South Carolina v. Katzenbach, 383 U.S. 301 (1966) 53

Stevenson v. Fain, 195 U.S. 165 (1903) 49

Sturges v. Crowninshield, 4 Wheat. 122 (1819) 56

Swann v. Charlotte-Mecklenburg Board of Education, 431 F.2d 138 (4th Cir. 1970) 74

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 3, 21, 29-34, 45, 59, 62-65, 68, 69, 70, 73-80, 82, 83, 85

Turner v. Bank of North America, 4 Dall. 8 (1799) 49

United States v. Hudson & Goodwin, 7 Cranch 32 (1812) 49

United States v. Jefferson County Board of Education, 372 F.2d 836 (5th Cir. 1966) 25

U.S.A. v. Tex. Edn. Agcy., ___ F.2d ___ (5th Cir. 1972) decided August 3, 1972 ..... 24, 25, 29, 31, 32, 33, 79, 84

Von Hoffman v. Quincy, 4 Wall. 553 (1866) 56

Winston-Salem/Forstyth County Board of Education v. Scott, 404 U.S. 1221 (1972) 71

Wright v. Council of City of Emporia, ___ U.S. ___ (1972), decided June 23, 1972 ..... 69, 72

Statutes Cited

Civil Rights Act of 1964, Section 407(a), 42 U.S.C. 200c-6 ..... 3, 20, 59, 61, 63, 65

Education Amendments of 1972, enacted June 23, 1972 ..... 2, 3, 4, 22, 23, 35, 47, 57, 61

Equal Educational Opportunities Act of 1972, passed House of Representatives August 18, 1972 ..... 3, 35, 36, 58

Constitutional Provisions

Article I, Section 8, Clause 9 (Constitutional Court Clause) 48

Article I, Section 8, Clause 18 (Necessary and Proper Clause) 48, 52, 58

Article III, Sections 1 and 2 (Jurisdiction Clause) 48, 49, 51

Article XIV, Section 5 (Enforcement Clause) 48, 49, 51, 52, 53, 54

Congressional Record

Congressional Record — House — H10407, H10408, November 4, 1971 ..... 12, 23

Congressional Record — Senate — S3014, March 1, 1972 64

Congressional Record — House — H1852, H1853, March 8, 1972 13

Congressional Record — Senate — S8282, May 24, 1972 14

Congressional Record — Senate — S8286, May 24, 1972 14

Congressional Record — Senate — S8396, S8397, May 24, 1972 16

Congressional Record — House — H5404, June 8, 1972 ..... 17, 58

Congressional Record — House — H5406, June 8, 1972 21

Congressional Record — House — H5416, June 8, 1972 18

Congressional Record — House — H5417, June 8, 1972 22

Congressional Record — House — H5419, June 8, 1972 19

Congressional Record — House — H7799, August 17, 1972 43

Conference Committee Report No. 92-1085, May 23, 1972, p. 220 ..... 13, 16, 17

Other Citations

50 Am. Jur. Statutes, Section 441 62

Annot. 70 A.L.R. 5, 26-39 9

Bork, Robert H. "Constitutionality of the President's Busing Proposals," American Enterprise Institute, Washington, D. C., May 1972 ..... 43, 52, 54, 55, 58

Cox, Archibald. "The Role of Congress in Constitutional Determinations," 40 Cincinnati Law Review, 199, 258 (1971) 52

Hart, Henry M. "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic," 66 Harvard Law Review, 1362 (1953) 55

The Supreme Court, 1970 Term, 85 Harvard Law Review, 3, 74 (1971) 73

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1972

No. 72-167

ANN GUNTER DRUMMOND, ET AL.,
Petitioners

vs.

ROBERT L. ACREE, ET AL.,
Respondents

vs.

COUNTY BOARD OF EDUCATION OF
RICHMOND COUNTY, GEORGIA, ET AL.,
Respondents

PETITIONERS SUPPLEMENTAL BRIEF

SUMMARY OF ARGUMENT

Subsequent to petitioning for certiorari, **Drummond**, appears to have become a case of first impression. Pursuant to the provisions of the **Education Amendments Act of 1972**, Title VIII, Section 803, a stay application was ultimately presented to Mr. Justice Powell sitting as Circuit Justice. It was denied on grounds that the legislature intended the automatic stay provisions of Section 803 to apply only to busing orders for racial balance. Petitioners respectfully contend this to be error and have renewed their stay application with Chief Justice Burger, requesting at the same time that it be submitted to the entire court for consideration.

As Portion I of this supplemental brief demonstrates exhaustively, the ruling of Mr. Justice Powell is the exact opposite of the legislative will. It is first argued that the words of the statute authorizing a stay are so clear in meaning that no interpretation is required. But, if deemed ambiguous, voluminuos excerpts from the Congressional Record both House and Senate clearly demonstrate the proper interpretation. It is the cardinal rule of statutory construction that the court give affect to legislative intent if ascertainable. When this can be unquestionably demonstrated, as **Drummond** does, courts have no prerogative to rule otherwise.

Under the reasoning advanced by Mr. Justice Powell, petitioners respectfully submit that Section 803 becomes entirely devoid of meaning. To construe the statute as it has been applied herein means simply that Congress has agreed to delay the implementation of busing orders, the mere existence of which was expressly made unlawful by Section 806 of the same

act, and which were already illegal under this Court's ruling in **Swann.**

Also subsequent to the docketing of certiorari in this case, were two full bench opinions by the United States Court of Appeals for the Fifth Circuit. The principles announced there conform precisely to petitioners' argument when on cross-appeal, and when **Drummond** is evaluated in their light a reversal is demanded.

Even more recently, the **Equal Education Opportunities Act of 1972** passed the House and is waiting consideration by the Senate. It concerns primarily the busing of elementary school students and adopts for the first time strict limitations. Since **Drummond** involves a court ordered plan for elementary children, the legislation could result in immediate re-evaluation of this case.

Another portion of the **Education Amendments of 1972** must be considered in detail by the Court. Section 806 re-acts the precise provisions of the 1964 Civil Rights Act, Section 407(a), interpreted by **Swann,** but includes the additional directive that it be applied uniformly to every state.

Because a distinction between states was absolutely essential to the holding in **Swann,** and having obviously been abrogated, a portion of that decision must now be reconsidered. Commentary from the Congressional Record reflecting the legislative history of Section 806 is fully supportive.

Lastly, a factual analysis of the desegregation plan has been prepared. It is evaluated by the standards this court has approved and which, if considered objectively, demand reversal.

ARGUMENT

It is difficult to conceive of a more mercurial and rapidly changing field of law than school litigation. Since filing the petition for certiorari in the instant case there have been subsequent developments (procedural, judicial, and legislative) which have direct and vital application.

I.

PROCEEDINGS SUBSEQUENT TO PETITION FOR CERTIORARI

The most significant of the trilogy above referred to appears to be procedural. This observation is made without equivocation, for at least one aspect of **Drummond** has become a case of first impression. On August 11, 1972 petitioners moved the District Judge to stay implementation of the elementary school plan, subject of this certiorari.[1] As authority for their request, reliance was placed upon the moratorium provisions contained in the **Education Amendments of 1972,** a recent enactment which received considerable emphasis in the petition for writ of certiorari.

Title VIII, Section 803 (Public Law 92-318, 86 STAT. 235) reads as follows:

> "PROVISION RELATING TO COURT APPEALS
>
> Sec. 803. Notwithstanding any other law or provision of law, in the case of **any order on the part of any United States district court which requires the transfer or transportation of any stu-**

[1] The motion and other pleadings referred to are presently on file with this court and no appendix is included. Docket numbers and filing dates are noted for identification.

dent or students from any school attendance area prescribed by competent State or local authority for the purposes of achieving a balance among students with respect to race, sex, religion, or socio-economic status, **the effectiveness of such order shall be postponed until all appeals in connection with such order have been exhausted** or, in the event no appeals are taken, until the time for such appeals has expired. This section shall expire at midnight on January 1, 1974." (Emphasis added).

By order dated August 18 said motion was denied by the District Judge and petitioners thereafter presented an application for stay to the Honorable Lewis F. Powell, sitting as Circuit Justice for the Fifth Circuit. Said application, Docket No. A-250, was filed August 24, and presented directly to this Court based on the pending jurisdiction and urgent need for immediate relief. Jurisdiction for this request was conferred by 28 U.S.C., Section 2102(f); 28 U.S.C., Section 1651(a); and Rules 27, 50, and 51 of the Supreme Court.

On August 25, 1972 Mr. Justice Powell denied the application on grounds that it had not been ruled upon prior by the Court of Appeals for the Fifth Circuit. Petitioners then sought immediate review pursuant to Rule 8(a) FRAP, and on August 26 an emergency application for stay was presented to the Honorable Lewis R. Morgan, Associate Judge of the Fifth Circuit Court of Appeals, Docket No. 72-2821.

On Monday, August 28, in an order signed by the Honorables John R. Brown, Chief Judge, and Lewis R. Morgan, Associate Judge, this application for stay was denied without comment. Upon notification a renewed application for stay, Supreme Court Docket

No. A-250, was filed the same day.

On September 1 petitioners were notified that they had been denied on grounds that the automatic stay provision of Section 803, above quoted, applied only to busing for racial busing and were inapplicable in the present case.

Petitioners respectfully contending this construction to be the antithesis of the legislative intent, have filed an exhaustively documented renewed application for stay pursuant to Rule 50(5). Its outcome is unknown at the present time.

As earlier stated a motion for stay based on the provisions of Section 803 was initially filed with the District Court. In his order the District Judge denied the motion based on a semantic distinction he drew between "appeals" and "certiorari." Petitioners contended this to be in error, and all subsequent applications contained documentation of that claim. It is extensively refuted by congressional history contained herein.

The next judicial echelon to deal with this issue on the merits was the U.S. Court of Appeals for the Fifth Circuit. In the order signed by the Honorable John R. Brown, Chief Judge, there appears only the word denied. What this means is unclear as it gives no hint of that courts' interpretation of Section 803.

It could be maintained that this represents a tacit approval of the reasoning of the District Judge. Unfortunately, it does not endorse the opinion of the lower court by commentary, so one is left undecided as to whether the denial is based on those grounds or others.

In either event it appears to be of no consequence, for Mr. Justice Powell, in his opinion, relied upon entirely different grounds. Since no mention is made of the District Court ruling it would appear that this was expressly rejected. This same thinking would hold true for the Circuit Court if their order is deemed to have adopted the thinking of the District Judge.

Because this legislation is of such recent vintage, very few opinions appear to date. Petitioners are under the impression that the opinion by Mr. Justice Powell on September 1, 1972 represents the first expression by the court on the issue.

What authority there is, however, appears to be in conflict. The U.S. Court of Appeals for the Fifth Circuit denied a stay based on Section 803 as just shown. On the other hand, the U.S. District Court for the Eastern District of Tennessee, Southern Division (Sixth Circuit) granted stay on the same statute.

Mapp v. Board of Education of Chattanooga No. 3564 in an order signed by the Honorable Frank W. Wilson, District Judge, construed Section 803 as being applicable. The busing order there is on the identical basis as **Drummond.** Although I know of no precedent for citing a District Court opinion as authority to reverse the Supreme Court, it is done here advisedly. Perhaps it will illustrate the need for consideration by nine Justices. Beginning at page 3 of the Memorandum dated August 12, 1972 it appears:

> **" . . . the Court has concluded that upon any rational construction of the statutory language, Section 803 does purport to apply to the facts and circumstances involved in the present litigation. To construe the statutory language 'any order . . . which requires the transfer or transportation**

of any student . . . for the purpose of achieving a balance among students with respect to race . . .' as having no application to school desegregation orders involving student transfers and transportation would not only be to ignore language that is in current and common widespread use as descriptive of the school desegregation plans wherein the transportation of students is involved, but would also attribute to Congress an attempt to enact an otherwise meaningless and irrelevant piece of legislation, because it could only apply to orders that are in themselves illegal in that they are in violation of the principles laid down in the Swann decision. Although this Court has repeatedly emphasized that its action in this case was directed toward the elimination of state-imposed racial segregation and not toward the imposition of any particular racial balance in any particular school, and has further emphasized that the racial composition of the student body of any school is relevant only as it may be evidence of present or past racial discrimination, **it would be to ignore the current use of the English language if the Court were not to acknowledge that the terms 'racial balance' have become a popular descriptive appellation applied to all desegregation orders wherein transportation of students is involved as a part of the plan.**

If Section 803 is to be rendered inapplicable to the present case, it would appear that such a determination would of necessity be dependent upon a resolution of the constitutionality of that legislation." (Emphasis added).

Also pending at this time is the Detroit case, **Bradley v. Milliken, et al.** No. 35257, U.S. District Court for the Eastern District of Michigan, Southern Division. It was argued before the U.S. Court of Appeals for the Sixth Circuit August 24, 1972. Section

803 was presented exhaustively by all parties including the Justice Department as Intervenor. A stay of the busing order for Detroit has been granted pending later ruling.

It thus appears, from the decisions which exist, that there is irreconcilible conflict in the interpretation of Section 803 by at least two circuits. This seems especially apparent in the **Chattanooga** case which is on all fours with **Drummond.** There is a compelling need, therefore, for direction from the entire Supreme Court.

We now arrive at the heart of the matter. It is respectfully contended that the opinion rendered by Mr. Justice Powell, sitting as a Circuit Justice, was the complete antithesis of what Congress had intended. It is generally recognized that the cardinal rule of statutory constitution to be followed by the courts is to give effect to the legislative will when ascertainable.

Such determinations, when necessary, use as their guide the legislative history of an Act. It is said to be composed of debates, amendments, committee reports, explanations by the author, comments by sponsors, and those of managers and floor leaders. Each of the foregoing is accorded different weight with the rule as follows:

> "In construing legislative intent by reference to the legislative history, the Court must differentiate between statements made by individual legislators and those made by the sponsors of the Bill, the chairmen of the committees which consider the Bill, and the conference committee reports." Annot. 70 A.L.R. 5, 26-39.

A considerable body of case law has arisen on this point. In considering weight to be given to statements made by the sponsors of a bill the Supreme Court has stated:

> "We have often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach. 'The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt'." **Schwegmann Bros. v. Calvert Distillers Corp.**, 341 U.S. 384, 394-395 (1951).

This same language was quoted verbatim with approval in **N.L.R.B. v. Fruit & Veg. Pck. & Whse., Loc. 760**, 377 U.S. 58, 66 (1964), wherein it was also observed that:

> "The silence of the sponsors of amendments is pregnant with significance."

Ironically enough, the dissent in **Schwegmann** supra also commented on this rule:

> "It has never been questioned in this Court that committee reports, as well as statements by those in charge of a bill or of a report, are authoritative elucidations of the scope of a measure." At page 400.

Spiegel's Estate v. Commissioner of Internal Revenue, 335 U.S. 632, 679 (1949) commented on statements appearing in the Congressional Record:

> "These statements on the floor by those in charge of the Resolution are controlling, as much as though they had been submitted in a Committee Report, for they were the authoritative explanation of the Resolution's purpose and mean-

ing."

The dissent by Mr. Justice Frankfurter in this case made specific reference to the number of decisions in the last decade in which the Supreme Court had given effect to legislative history. He lists in Appendix A at page 687 three pages of citations numbering 137 separate opinions so doing.

With these rules, firmly established as they are, appreciation of Section 803 is enhanced.

The first phase in the history of Section 803 was when it was introduced by Congressman Broomfield in the U.S. House of Representatives on November 4, 1971. On that evening Mr. Broomfield stated:

> "Mr. Chairman, my amendment would postpone the effectiveness of any U.S. district court order requiring the forced busing of children to achieve racial balance until all appeals to that order have been exhausted.
>
> • • • • •
>
> ". . . [S]ome U.S. federal courts have ordered busing in recent months. In many instances, I feel that these orders are breaking new constitutional ground — that these orders have created a new and unprecedented extension of existing law.
>
> • • • • •
>
> "We can expect that many of these decisions ordering busing will be appealed and that on appeal they may be overturned. However, the appeals process is a long and difficult one. It may take two or three years. Thus, before the courts can completely decide this question, before the law is crystalized once and for all, busing will become an accomplished fact.
>
> "Mr. Chairman, forced busing may prove to be an expensive, time consuming and disruptive

mistake.

"My amendment would only delay a lower court's busing order until all those parties have had a chance to plead their case at their court of last resort."

• • • • •

Congressional Record — House H10407, H10408, November 4, 1971.

Following House passage of the "Education Amendments of 1972," with Section 803 as an amendment, a measure by the same title, but with different "anti busing" provisions, was passed by the Senate. Consequently, the Act again came up for debate in the House on a motion to send it to Conference Committee. The following debate addressed to Section 803 was had on March 8, 1972:

MR. BROOMFIELD. "Mr. Speaker, I rise to stress the importance of retaining the House language of the amendment to stay busing orders until all appeals have been exhausted.

• • • • •

"Mr. Speaker, the other body would have us discriminate against some busing orders. Some orders would be stayed pending appeal and others would not. We should write the law so that it applies uniformly to all cases which involve busing, otherwise, this law will be by definition, unfair." (Emphasis added.)

• • • • •

MR. GERALD R. FORD. "I would like to ask the gentleman several questions. First, is the Broomfield amendment retroactive?"

MR. BROOMFIELD. "Yes; it is."

MR. GERALD R. FORD. "It is retroactive in its entirety?"

MR. BROOMFIELD. "In its entirety."

MR. GERALD R. FORD. **"The second question is this: Your amendment states that the effectiveness of 'any order' to achieve a racial balance of students 'shall be postponed'.**

"Now, does that mean that it would affect orders which have already been put into effect or put into partial effect? In other words, all would be suspended pending final appeal?" (Emphasis added).

MR. BROOMFIELD. "That is correct."

* * * * *

MR. GERALD R. FORD. **"Mr. Speaker, if the gentleman will yield further, is it the intent of the author of the amendment that this stay during an appeal of any order shall be equally applicable not only to orders involving forced busing but to desegregation cases generally?"** (Emphasis added).

MR. BROOMFIELD. **"Yes; it would be, in both cases."** (Emphasis added).

* * * * *

Congressional Record — House — H1852, H1853, March 8, 1972.

After protracted debate on the "anti busing" provisions, House and Senate conferees approved a version which contained the Broomfield Amendment in its entirety. This appeared in Conference Committee Report No. 92-1085, Education Amendments of 1972, May 23, 1972, p. 220.

It was brought before the Senate shortly thereafter and Senator Pell was the floor manager. Ensuing debates contained the following remarks:

SENATOR PELL. ". . . The conferees strug-

gled long and hard over the so-called busing amendments. The Conference Report adopts verbatim the Broomfield Amendment, except that the duration of the Amendment is limited to January 1, 1974. During conference discussion, there was disagreement as to the meaning of the Broomfield language. Here I would say that a literal reading of the language by a non-lawyer would indicate that if a local educational agency is under an appealable order to transport students to achieve racial balance, that local educational agency can receive a stay of that order whether it has been implemented or not. I except that today's debate will bring disagreement from those who have more of a legal background on the subject than I. **However, I would say that the Senate is not in the habit of enacting frivolous language, and those who interpret our work as a sham and a fraud do injustice to both the Senate and the House."** Page S8282. (Emphasis added).

* * * * *

SENATOR JAVITS, speaking against the Broomfield Amendment, stated:

"Then, Mr. President, we come to the Broomfield Amendment, which was finally compromised as between the two bodies, and here again we have an absolutely flat, automatic stay of any order until appeals have been exhausted. At least, if you take the language for what the House sponsors say it means — and I will discuss that in a moment — you have an automatic stay for 19 (sic) months of any lower court order which would seek either to transfer or to transport students in respect of what again I say the Amendments House sponsors claim is an effort to desegregate in order to comply with the Constitution." Page S8286. (Emphasis added).

Senator Dominick, who is the ranking minority

member of the Education Subcommittee of the Senate and a member of the Conference Committee which reported on Section 803, stated as follows:

MR. DOMINICK. "Mr. President, as the ranking minority member of the Education Subcommittee, I rise in support of the Conference Report of the Education Amendments of 1972."

"To those colleagues who oppose the Conference Report because effect of the Broomfield language is ambiguous or not strong enough I point out that this was the best we could get. May I quote to you some legislative history from the House side describing exactly what is intended by the language. On March 8, 1972, the distinguished minority leader (Mr. Gerald R. Ford) asked the author of the Amendment several highly pertinent questions. The colloquy went like this:

"MR. GERALD R. FORD. I would like to ask the gentleman several questions. First, is the Broomfield amendment retroactive?

MR. BROOMFIELD. Yes; it is.

MR. GERALD R. FORD. Is it retroactive in its entirety?

MR. BROOMFIELD. In its entirety.

MR. GERALD R. FORD. The second question is this: Your amendment states that the effectiveness of 'any order' to achieve a racial balance of students 'shall be postponed.'

Now, does that mean that it would affect orders which have already been put into effect or put into partial effect? In other words, all would be suspended pending final appeal?

MR. BROOMFIELD. That is correct."

"The only limitations that the conference placed on the express and clearly intended language of the Broomfield Amendment are the termination date of January 1, 1974, and the statement of the conference's qualification that it affects only appealable orders. I understand this qualification to add nothing other than to substantiate the finality of the order language already contained in the Amendment. In view of the language and the legislative intent, I believe that the effect of Broomfield is clear, and my colleagues should vote accordingly with full knowledge of the consequences."

Congressional Record — Senate, S8396, S8397, May 24, 1972.

The Conference Committee Report was brought before the House in June of 1972, and Congressman Quie, the ranking minority member of the House Committee on Education and Labor and a member of the Conference Committee, co-managed the Report with Congressman Perkins. On June 8, 1972, Congressman Quie stated:

> **". . . [t]he Broomfield amendment, . . . was aimed solely at staying Federal court desegregation orders involving the transfer or transportation of students until all appeals are exhausted or until the time for taking such appeals has expired without one being taken. This is an extremely important and necessary action designed to obtain equity and uniformity in these cases, and perhaps to give the Federal judiciary some time to assess the mood of Congress and the country with respect to wholesale busing of school children."** (Emphasis added).
>
> * * * * *
>
> "Accordingly, the conference report contains

without substantive change the most significant and effective of the amendments covered by the instructions of the House. **For the first time in the field of school desegregation the Congress will be exercising its authority, which is limited under the Constitution, to regulate the actions of Federal courts."** (Emphasis added).

Congressional Record, House, H5404, June 8, 1972.

Further on in the debate on accepting the Conference Committee Report the following colloquy occurred between Congressman Broomfield and Congressman O'Hara, co-sponsors of Section 803, and Congressman Perkins, the Chairman of the Conference Committee and the Chairman of the House Committee on Education and Labor:

MR. O'HARA. "Mr. Speaker, I am particularly interested in the provisions of section 803 of the conference report.

"First, I would like to ask MR. BROOMFIELD about his meaning when his amendment spoke of an order of a district court requiring the transfer or transportation of students 'for the purpose of achieving a balance among students with respect to race, sex, religion, or socio-economic status.' In all of the court orders with which I am familiar, the court has stated that its purpose is to prevent unconstitutional segregation of students. **May I inquire of the gentleman from Michigan if it was his intention that section 803 apply to orders that have the practical effect of achieving some sort of racial balance, although the court may have stated that its order was entered for the purpose of correcting unconstitutional segregation?"** (Emphasis added).

MR. BROOMFIELD. **"Yes; it was my inten-**

tion to cover such cases and specifically, it was my intention to cover cases like those now being litigated in Richmond and Detroit." (Emphasis added).

MR. O'HARA. **"May I ask the chairman of the conference committee, the gentleman from Kentucky, if his understanding is the same as that of the gentleman from Michigan (MR. BROOMFIELD)?"** (Emphasis added).

MR. PERKINS. **"Yes, it is. It is my understanding that section 803 covers district court orders which require the transfer or transportation of students for racial purposes whether the court order is framed in terms of correcting unconstitutional segregation or whether it is framed in terms of 'achieving a balance among students with respect to race'."** (Emphasis added).

* * * * *

Congressional Record — House, H5416, June 8, 1972.

Later in the same debate, Congressman Broomfield made the following statement:

"Mr. Speaker, I would like to address one final point. There has been some confusion, some misunderstanding about the operation of my antibusing amendment. I have read with a great deal of surprise that my amendment only applies to busing for purposes of arriving at a racial balance.

"I have seen my amendment quoted out of context so as to imply that it will not be effective in preventing the vast majority of busing which is or will be ordered. I suggest that a complete reading of the language reads, 'for the purpose of achieving a balance among students with respect to race, sex, religion or socioeconomic status'.

"I repeat it halts busing ordered on the basis of socioeconomic status. That phrase was purposely added to my bill and retained only after a great deal of thought. Our feeling was that the phrase is wide enough and open enough to include any rationale or basis which a court might conceive of in order to justify busing.

"I realized that by limiting the language only to cases involving racial balance, there would be those who would try to skirt and evade the obvious and clear intent of my bill. My bill delays all busing orders pending appeal and socioeconomic covers enough ground to make sure that happens." (Emphasis added).

Congressional Record — House, H5419, June 8, 1972.

The preceding congressional commentary is comprised of extensive discussion by the author of Section 803, co-sponsors, floor managers, chairmen, and members of the Conference Committee, as well as opposition debate. With unmistakable clarity they point out the intent of the legislators.

Prophetic indeed were the final remarks by the author, Congressman Broomfield, last quoted above and underlined for emphasis. It is almost as if he were addressing them to the opinion by Justice Powell in the instant case.

Although bordering on redundancy, the importance of this issue compels me to include one final item of history. It is a release by Congressman William S. Broomfield to his constituency, seeking to provide full explanation of his amendment with particular reference to Detroit:

"It is a well settled principle of law that when

the wording in a statute is ambiguous, those who must interpret its meaning shall look to the legislative history (committee reports, debate, explanations by its author, etc.) of the language in order to determine its meaning.

"The Broomfield Amendment is ambiguous in that it speaks of 'the transfer or transportation of any students . . . for the purpose of achieving a racial balance among students.' The ambiguity arises because courts typically order desegregation of schools to carry out constitutional mandates against segregation created by an act of law (de jure segregation), but will not admit to having ordered, even where they in effect have done so, a 'racial balance' in the schools. Hence, any number of appropriations bills passed by Congress have had prohibitions against the use of Federal funds to achieve 'racial balancing,' but these have not applied to de-segregation orders by the courts or by the Department of Health, Education and Welfare in enforcing Title VI of the 1964 Civil Rights Act. Accordingly, standing alone, the language of the Broomfield Amendment arguably might not apply to the Roth decision or others like it. However, in the case of the Broomfield Amendment, the legislative history as to my intent and the understanding of the House of Representatives in adopting it is so strong that it leaves no room for doubt that it does apply to the Roth decision.

"The House, not once but on three separate occasions, discussed the Broomfield Amendment on the Floor. The first time was when the amendment was adopted on November 4, 1971. In explaining my amendment, I made reference to the statement of Chief

Justice Burger in September of 1971 to the effect that some Federal judges were misreading the Court's April decision (Swann v. Charlotte-Mecklenberg Board of Education (1971)) on busing by ordering more than the law requires. I said,

> 'Given these conflicting judicial statements on just what the law says in regard to busing, it is easy to understand the confusion and emotion that surrounds the busing issue.'
>
> 'We can expect that many of these decisions ordering busing will be appealed and that on appeal they may be overturned. However, the appeals process is a long and difficult one. It may take two or three years. Thus, before the courts can completely decide this question, before the law is crystallized once and for all, busing will have become an accomplished fact.' (H10408)
>
> 'When it is signed into law, it will constitute the first act by the Congress to prevent such assignment of transportation of pupils until the Supreme Court has had an opportunity to act on this controversial matter.' (H5406)

"Later, in the course of the same debate, additional and sustaining history was made by Mr. James O'Hara and the Chairman of the Committee, Mr. Perkins, that the language would apply retroactively to any order entered before the effective date of the legislation, so long as any appeal was pending or the time for filing an appeal had not run out with no appeal having been filed. Congressman Esch of Michigan concluded with the following words:

> 'For the first time, the very first time, the Congress in this legislation is placing a limitation on the Federal Courts in their execution of busing orders. Now there are some who argue that the

Broomfield amendment in its reference to racial balance might well apply to all busing orders, **but the legislative history, and the legislative history just repeated, indicates clearly that it applies to all orders, and that history will be determining.'** (H5417) Emphasis added).

"The legislative history of this amendment in the House is critical because the amendment originated in the House of Representatives. Ordinarily there are only a few words written or spoken concerning the meaning of a particular amendment, and where the language is in any way ambiguous the meaning may be subject to doubt. Here the legislative history is so complete, and the explanations so comprehensive and so explicit, that there can be no doubt about the scope and application of the Broomfield amendment." (Emphasis added).

One final aspect of Section 803 requires emphasis in view of the reliance Mr. Justice Powell placed on Section 802 in his interpretation.

Legislative history of the Broomfield Amendment clearly indicates that it cannot be construed in **pari materia** with the other provisions of the Education Amendments as contained in S659. The **Education Amendments of 1972** are very comprehensive and were carefully developed over a period of time by committees of Congress dealing with problems of higher education. Section 803 was attached originally as a rider to S659 on November 4, 1971. The amendment had never been referred to a committee of Congress for consideration and the Congressional Record clearly indicates that the amendment was considered by members of Congress to be not germane to the original legislation before the House of Representa-

tives. Congressional Record — House, H10407 — 10409 contains the original offering of the Broomfield Amendment and the attempts by members of Congress to prevent consideration of the amendment because of its lack of germane.

Counsel for petitioners is informed that it is a custom and precedent of the House of Representatives that when an amendment to a bill is offered, and read by the clerk of the House of Representatives, objection must immediately be made as to the "germaneness" of the amendment to the original legislation, or such objection is lost. On November 4, 1971 while the House of Representatives was sitting as a committee of the whole, question as to germaneness was raised and ruled "too late" by the Chairman.

The entire legislative history of Section 803 indicates that it was intended to operate as a separate piece of legislation, having no direct bearing on other provisions of the Higher Education Amendments, and accordingly, it should not be considered to be conditioned by, or modified by, any other provisions of the Higher Education Act.

For reasons, extensively set out in the preceding pages, this issue should be considered by the entire Court on certiorari, unless fully disposed of prior. It is petitioners fervent hope that they will have been favorably re-evaluated by that time, thereby becoming moot.

II.

RECENT CASE LAW

Less than a week after certiorari was docketed the United States Court of Appeals for the Fifth Circuit rendered two opinions that should be controlling authority insofar as this case is concerned. **Cisneros v. Corpus Christi Ind. Sch. Dist.,** ___ **F. 2d.** ___ **(5th Cir. 1972) and U.S.A. v. Tex. Edn. Agcy.,** ___ **F.2d** ___ (5th Cir. 1972), hereinafter cited as **Austin.** Both decided August 2, 1972.

Each of these decisions prescribed a series of steps for the District Court to follow in preparing desegregation orders. With one exception this basis was the same for both school districts. It was a salutary procedure such as this which petitioners implored that court, without response, to adopt while on cross-appeal.

Such selective deafness of the judicial ear compelled, of necessity, resort to this court. Admittedly, Richmond County, Georgia is not as populous as Austin or Corpus Christi, Texas; but the fate of 15,000 elementary school children and their parents deserves no less consideration.

For reasons which remain obscure the Circuit Court subsequently embraced with affection the arguments petitioners advanced to no avail. As the brief on file in this case clearly illustrates, Richmond County surged without interval from an HEW plan, considered viable and proper as late as July of 1971, into massive cross-county busing.

Bad faith of the school board was said to be the justification, yet they were operating according to the

Court approved plan, and everyone knows the high regard this Circuit Court holds for HEW proposals, as per **Austin** supra at page 20:

> "Normally, in fashioning a remedy, the recommendations of the Department of Health, Education, and Welfare are entitled to great weight." **United States v. Jefferson County Board of Education,** 372 F.2d 836, 847 (5th Cir. 1966).

These precipitous and unremitting demands of the District Court order were decried by petitioners (then cross appellants) in their brief before the Circuit Court. A central, salient issue was presented thereby:

> "To what extent is the forced busing of students pursuant to a desegregation order of the District Court constitutionally permissible?"[2]

Arguments addressed to this pivotal question began with the following premise:

> **"It should be noted at the outset that the intervenors do not challenge the rights of the court to order busing for desegregation purposes, however unpalatable it may be. The sole question under consideration here is one of extent, rather than concept."**[3] (Emphasis added).

This is a valid inquiry, yet the answers provided have been as enigmatic as the question itself. It was wholly inadequate to simply intone the trite but familiar platitude that discretion of the District Judge is all controlling. This discretion, like all discretion, has depths and heights and widths and bounds, and

---

[2] Brief on Cross-Appeal, Case No. 72-1211, filed March 6, 1972.

[3] Petition for Rehearing, Case No. 72-1211, filed April 13, 1972.

each of these dimensions cannot remain forever undefined.

Adherence to an untenable position is judicially undesirable. Prophetically, this proved to be true with the Fifth Circuit. **Cisneros** supra, for all the other matter considered, has at its heart the same issue as **Drummond.** Too much busing is too much!

When again cast upon the waters this argument yielded a response, and the majority of a full bench agreed. Not only were the transportation requirements of the District Court order deemed excessive, but an understandable formula was announced for the District Judge to use upon remand.

The totality of this ruling exceeds the reach announced by any Court to date. Two separate determinations serve to brand it as unique. Not only does it discard, for the first time judicially, the "anodyne dichotomy of classical de facto and de jure segregation," but its principles are directed at a tri-ethnic group, Mexican-Americans, Blacks and Whites.

If the tennets announced here are capable of being applied in a situation as complex as this, there is all the more reason to use them in **Drummond.** This portion of the holding, entitled "Remedy", appears as follows commencing at page 20:

REMEDY

> "We turn now to the remedy fashioned by the district court. **We conclude that a different approach may achieve a constitutional result without involving the conversion of the school system from a non-transportation to a transportation basis to the extent ordered by the district court.**
>
> **"On remand, the district court is directed to**

desegregate the school system on the following basis: (Emphasis added).

(1) It is the prerogative and duty of those local officials having charge of the Corpus Christi Independent School District to formulate and implement student assignment plans.

(2) Where a student assignment plan is found to be unconstitutional, as here, because of the existence of segregation which has been imposed by statute or by official act against blacks an identifiable ethnic group (here at the Mexican-American students), it is the duty of the school officials to forthwith formulate and implement such student assignment plan as will remedy the discrimination which has been found to exist. Where one race schools continue to exist, school authorities must show that such schools are now the result of present or past discrimnation on their part. **Swann,** 402 U.S. at 26.

(3) In the event the school officials abdicate this responsibility or fail to remedy the discrimination forthwith, the district court is empowered to and should proceed forthwith to remedy the discrimination.

(4) Usually in rural, and in some city school districts where the population is diffused, assignment on a strict neighborhood basis has been sufficient to eliminate discrimination in student assignments. It is apparent that this will not suffice in the Corpus Christi Independent School District, although it may suffice as to some schools. To the extent that it does not suffice, the district court will proceed to employ other methods of desegregation.

(5) The pairing or clustering of schools, the realignment of school assignment zones, and the relocation of portable school rooms will be me-

thods of eliminating segregated schools. Pairing or clustering should be of schools in close proximity. The pairing or clustering of schools in close proximity and the realignment of school zones will result merely in an expansion of the neighborhood or community school concept. Such transportation problems as may arise will thereby be minimized. Another method of eliminating segregated schools with little increase in transportation is to restructure the assignment of students already being transported.

(6) If after untilzing the procedures outlined above, prescribed segregated schools still exist, the court must consider the pairing or clustering of schools in non-contiguous school zones. **Swann,** 402 U.S. at 28. **No such pairing or clustering of non-contiguous school zones may be required until the court has exhausted every other possible remedy which would not involve increased student transportation. Whenever the court must exercise its power to pair or cluster schools located in non-contiguous zones, it must minimize student transportation requirements in such plan as is devised to pair or cluster schools located in non-contiguous zones.** (Emphasis added).

The length and time of travel for students under any plan must be considered in light of the age of the children, and the risk to health and probably impingement on the educational process. **Swann,** 402 U.S. at 30-31. The material consideration in assessing the probable effect on health and the educational process as to each particular child will be the time required for transportation as distinguished from distance. Under some plans, children will be transported from their neighborhood school to the school of assignment rather than from their homes to the school of assignment. In such event, the time consumed in travel must include the time necessary to reach

the neighborhood school or other point of embarkation.

*****

(7) As the Supreme Court made clear in Swann, the requirement of ' . . . any particular degree of racial balancing or mixing . . . ' as a matter of substantive constitutional right would be disapproved. 402 U.S. at 24. Such racial balance as may result from the pairing or clustering or rezoning of schools is constitutionally permitted as 'an interim corrective measure.' Swann, 402 U.S. at 27."

Austin, the companion case, contains a specially concurring opinion approved by eight of the fourteen judges on the full bench. It adopts the same seven standards just enumerated, plus an additional one applicable only to that case. Perhaps of greatest importance, however, is the preamble to the special concurrence which provides even more specific guidance to District Judges.

This opinion of Judge Bell, also author of the remedy just quoted, represents consummate forensic expression. Not only does it extract with precision the key points of **Swann** and **Davis**, but goes further and reduces them to a workable procedure readily understood. This is not mere rhetoric, but analytical expertise by a judge on the circuit dealing with more school cases than all others combined.

These observations in **Cisneros** and **Austin** are trenchant and incisive, providing illumination for judges and counsel alike. In recognizing the District Courts' needs for "definitive direction", logic is injected into this labyrinthine maze, thereby fulfilling the highest obligation of an appelate court.

This concurrence begins at page 71:

"In our view the remedy which the district court is required to formulate should be formulated within the entire context of the opinion in **Swann v. Charlotte-Mecklenberg Board of Education,** 1971, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554, and the companion case of **Davis v. Board of School Commissioners of Mobile County,** 1971, 402 U.S. 33, 91 S.Ct. 1289, 28 L.Ed.2d 577.

"In giving effect to Swann we have in mind that the Supreme Court has placed the primary responsibility for desegregating public schools on the 'informed judgement' of the district courts. It is necessary, however, in the appellate process, where many complicated school cases involving urban school systems are within the jurisdiction of this court, that some definitive direction be given with respect to the remedy which is to be fashioned in the district courts. (Emphasis added).

"There are two key passages in **Swann** which have to do with the remedy which is appropriate in school desegregation cases and we read these as being concomitant. The first is concerned with the power of the federal courts. The other pertains to the constitutional duty of the school authorities. With respect to power the Supreme Court said:

'[A] school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution.

'In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers

may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults.

'School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court. As with any equity case, the nature of the violation determines the scope of the remedy.' 402 U.S. at 15-16.

"The difference between the broad power of the school boards in making student assignments and the limitations on the power of the federal courts is explicit and at once apparent from **Swann.** In the federal courts, the nature of the violation determines the scope of the remedy."

* * * * *

At page 75:

"Given these principles, and the other definitive instructions contained in **Swann** and **Davis,** we have concluded that the district court should proceed to eliminate the dual school system as it has existed in **Austin** together with any and all discriminatory segregation which exists against Mexican-American and black students on the following basis:"

(Herein are listed the seven steps earlier set out,

as well as an additional point to be discussed later).

* * * * *

"An overall amelioration of any possible discrimination will tend to be accomplished by the use of the mandatory majority to minority transfer provision of **Swann,** supra, 402 U.S. at 36-37, heretofore ordered by the district court. Such a provision will guarantee to both races an unfettered right to attend schools with members of an opposite race or identifiable ethnic group, and with transportation provided. The district court is directed to constitute a tri-ethnic committee in the school district to foster the use of the majority to minority transfer.

"We have previously outlined the requirements of desegregating school systems from the standpoint of faculty, staff, transportation, extracurricular activities, and facilities. **Singleton** v. **Jackson Municipal Separate School District,** 5 Cir., 1970, 419 F.2d 1211. See also **Carter v. West Feliciana Parish School Board,** 5 Cir., 1970, 432 F.2d 875, 878-79, explicating the **Singleton** rule to preserve and maintain a non-discriminatory merit system in faculty selection and retention. This left only the question of student assignment and we know from experience that this question has resolved itself principally into student assignment in urban school districts. Fidelity to the principles announced in **Swann** and **Davis** and the use of the approach outlined herein offers the best promise of promtly resolving the student assignment question posed in an urban school district such as Austin."

The additional consideration not appearing in **Cisneros** was necessitated by the comparison of the **Austin** school system. At page 75:

* * * * *

"(3) The power of the district court will depend first upon a finding of the prescribed discrimination in the school system. **Swann,** 402 U.S. at 16. In determining the fact of discrimination **vel non,** whether imposed by statute or as a result of official action, the district court must identify the school or schools which are segregated as a result of such discrimination. This identification must be supported by findings of fact. The importance of such a determination will be seen in some populous school district embracing large geographical areas. There may be segregated schools which are the result of unconstitutional statutes or of official action. There may be other one race schools which are the product of neutral, non-discriminatory forces."

* * * * *

This language has tremendous significance in the present case. A three judge panel of the same circuit court has ruled that the schools of Richmond County are operated on a de jure as well as a de facto basis.[4] Yet no finding of fact by the District Judge appears in the record sufficient to enable a designation of which schools fell into what category.

Notwithstanding this a blanket order affecting 29 elementary schools was approved by the Appeals Court only three months ago, with no consideration given this point. Both **Austin** and **Cisneros** are full bench opinions, and it is respectfully contended that the above portions must be applied to **Drummond.** This is especially true in view of the fact that the findings of the three judge panel are not compatible with the mandatory directives of the entire bench.

---

[4] Petition for Certiorari, Appendix I, Page A-3.

Since the Court of Appeals for the Fifth Circuit, speaking through an en banc decision has now announced the law, no plausible reason exists for depriving petitioners of its use. By simply castigating the school board and doubling the punishment accorded, the demands of justice are not met. This court, as did those below, sits as one of Equity and its decisions must reflect it.

Whatever the shortcomings of the school board may have been, it must be recognized that they undertook to correct the situation once their duty was sufficiently appreciated. In June of this year a constitutionally acceptable plan for secondary schools was presented to and accepted by the District Judge. It required little or no increase in busing.

This action shows two things: an awareness of obligations; and secondly, it underscores the fact that the elementary plan is an overkill. Petitioners have steadfastly asserted this second observation. We have never argued, as briefs on file with the Circuit Court show, that busing is illegal,, although admittedly we do not like it. All we have ever said is that reason and the principles pronounced by **Swann** must be applied.

Instead of vaulting to the pinnacle of absurdity, less devastating remedies should be exhausted. This is what the Circuit Court, by full bench decision, has just said in separate cases. There can be no equity, whatsoever, by imposing upon 15,000 of the youngest students in the system, some punitive measure claimed justified by misfeasance of a body whose actions they could not control.

III

RECENT LEGISLATIVE PROVISIONS

Recent legislation is equally innovating. On August 18, 1972 the **Equal Educational Opportunities Act of 1972** passed the House of Representatives by an overwhelming vote and was read for the first time in the Senate. Both bodies of Congress recessed that day until September 5, 1972 at which time it will be considered by the upper house.

The purpose and policy of this measure is unique as it recognizes, for the first time legislatively, the miasma of school desegregation in its present form. By stating that the neighborhood is the appropriate basis for determining public school assignments, this bill expresses a view neither new nor revolutionary. Fortunately, it does not stop here, but seeks to deal completely with the problem at hand by specifying appropriate remedies for the orderly removal of vestiges of any dual system.

I realize fully that this is not yet law. However, it reflects the views of some 300 members of the House of Representatives, the President of the United States who introduced legislation, and approximately 80% of the population of this country (depending on which poll was followed). Because of this it merits credence and consideration by the Supreme Court.

When one remembers that it follows by less than two months the **Education Amendments of 1972,** it takes on special significance. That act represented the first congressional restraint ever placed on a District Court in school litigation. The moratorium provision of Title VIII, Section 803 (Broomfield Amendment) postponed the effectiveness of desegregation orders

until reviewed by the Supreme Court.

This proximity in time and similarity in purpose reflects a dominant mood in the country. If sentiment so overwhelming is given no expression, our purported democracy becomes a fraud. Exactly what governmental form it would be is debateable, but certainly the tail would be wagging the dog.

For these reasons I have taken the liberty of quoting at length from this act.

EQUAL EDUCATIONAL OPPORTUNITIES ACT OF 1972 — POLICY AND PURPOSE

SEC. 2 (a) The Congress declares it to be the policy of the United States that ——

(1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and

(2) the neighborhood is the appropriate basis for determining public school assignments.

(b) In order to carry out this policy, it is the purpose of this Act to authorize concentration of resources under the Emergency School Aid Act on educationally deprived students and to specify appropriate remedies for the orderly removal of the vestiges of the dual school system.

TITLE II: UNLAWFUL PRACTICES DENIAL OF EQUAL EDUCATIONAL OPPORTUNITY PROHIBITED

SEC. 201. No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by ——

(a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools;

(b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps, consistent with title IV of this Act, to remove the vestiges of a dual school system;

(c) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of race, color, sex, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student;

(d) discrimination by an educational agency on the basis of race, color, or national origin in the employment, employment conditions, or assignment to schools of its faculty or staff, except to fulfill the purposes of subsection (f) below;

(e) the transfer by an educational agency, whether voluntary or otherwise, of a student from one school to another if the purpose and effect of such transfer is to increase segregation of students on the basis of race, color, or national origin among the schools of such agency; or

(f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

SEC. 3. (a) The Congress finds that —

(1) the maintenance of dual school systems

in which students are assigned to schools solely on the basis of race, color, sex, or national origin denies to those students the equal protection of the laws guaranteed by the fourteenth amendment;

(2) for the purpose of abolishing dual school systems and eliminating the vestiges thereof, many local educational agencies have been required to reorganize their school systems, to reassign students, and to engage in the extensive transportation of students;

(3) the implementation of desegregation plans that require extensive student transportation has, in many cases, required local educational agencies to expend large amounts of funds, thereby depleting their financial resources available for the maintenance or improvement of the quality of educational facilities and instruction provided;

(4) transportation of students which creates serious risks to their health and safety, disrupts the educational process carried out with respect to such students, and impinges significantly on their educational opportunity, is excessive;

(5) the risks and harms created by excessive transportation are particularly great for children enrolled in the first six grades; and

(6) the guidelines provided by the courts for fashioning remedies to dismantle dual school systems have been, as the Supreme Court of the United States has said, "incomplete and imperfect," and have not established, a clear, rational, and uniform standard for determining the extent to which a local educational agency is required to reassign and transport its students in order to eliminate the vestiges of a dual school system.

(b) For the foregoing reasons, it is necessary and proper that the Congress, pursuant to the powers

granted to it by the Constitution of the United States, specify appropriate remedies for the elimination of the vestiges of dual school systems.

• • • • •

BALANCE NOT REQUIRED

SEC. 202. The failure of an educational agency to attain a balance, on the basis of race, color, sex, or national origin, of students among its schools shall not constitute a denial of equal educational opportunity, or equal protection of the laws.

ASSIGNMENT ON NEIGHBORHOOD BASIS NOT A DENIAL OF EQUAL EDUCATIONAL OPPORTUNITY

SEC. 203. Subject to the other provisions of this title, the assignment by an educational agency of a student to the school nearest his place of residence which provides the appropriate grade level and type of education for such student is not a denial of equal educational opportunity or of equal protection of the laws.

• • • • •

TITLE IV: REMEDIES

FORMULATING REMEDIES; APPLICABILITY

SEC. 401. In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, a court, department, or agency of the United States shall seek or impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws.

SEC. 402. In formulating a remedy for a denial of equal educational opportunity or a denial of the

equal protection of the laws, which may involve directly or indirectly the transportation of students, a court, department, or agency of the United States shall consider and make specific findings on the efficacy in correcting such denial of the following remedies and shall require implementation of the first of the remedies set out below, or on the first combination thereof which would remedy such denial:
(Emphasis added)

(a) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account school capacities and natural physical barriers;

(b) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account only school capacities;

(c) permitting students to transfer from a school in which a majority of the students are of their race, color, or national origin to a school in which a minority of the students are of their race, color, or national origin;

(d) the creation or revision of attendance zones or grade structures without requiring transportation beyond that described in section 403;

(e) the construction of new schools or the closing of inferior schools;

(f) the construction or establishment of magnet schools; or

(g) the development and implementation of any other plan which is educationally sound and administratively feasible, subject to the provisions of sections 403 and 404 of this Act.

TRANSPORTATION OF STUDENTS

SEC. 403. (a) No court, department, or agency of the United States shall, pursuant to section 402, order the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence which provides the appropriate grade level and type of education for such student.

DISTRICT LINES

SEC. 404. In the formulation of remedies under section 401 or 402 of this Act, the lines drawn by a State, subdividing its territory into separate school districts, shall not be ignored or altered except where it is established that the lines were drawn for the purpose, and had the effect, of segregating children among public schools on the basis of race, color, sex, or national origin.

VOLUNTARY ADOPTION OF REMEDIES

SEC. 405. Nothing in this Act prohibits an educational agency from proposing, adopting, requiring, or implementing any plan of desegregation, otherwise lawful, that is at variance with the standards set out in this title, nor shall any court, department, or agency of the United States be prohibited from approving implementation of a plan which goes beyond what can be required under this tile, if such plan is voluntarily proposed by the appropriate educational agency.

REOPENING PROCEEDINGS

SEC. 406. On the application of an educational agency, court orders, or desegregation plans under title VI of the Civil Rights Act of 1964 in effect on

the date of enactment of this Act and intended to end segregation of students on the basis of race, color, or national origin, shall be reopened and modified to comly with the provisions of this Act. The Attorney General shall assist such educational agency in such reopening proceedings and modifications.

LIMITATION ON ORDERS

SEC. 407. Any court order requiring, directly or indirectly, the transportation of students for the purpose of remedying a denial of the equal protection of the laws shall, to the extent of such transportation, be terminated if the court finds the defendant educational agency is not effectively excluding any person from any school because of race, color, or national origin, and this shall be so, whether or not the schools of such agency were in the past segregated de jure or de facto. No additional order requiring such educational agency to transport students for such purpose shall be entered unless such agency is found to be effectively excluding any person from any school because of race, color, or national origin, and this shall be so, whether or not the schools of such agency were in the past segregated de jure or de facto.

SEC. 408. Any court order requiring the desegregation of a school system shall be terminated, if the court finds the schools of the defendant educational agency are a unitary school system, one within which no person is to be effectively excluded from any school because of race, color, or national origin, and this shall be so, whether or not such school system was in the past segregated de jure or de facto. No additional order shall be entered against such agency for such purpose unless the schools of such agency are no longer a unitary school system.

Even casual reading of these provisions makes it abundantly clear that passage of anything resembling the present form would have immediate bearing on this case. We are dealing here with an elementary school plan requiring massive cross-county busing of young children, the exact situation this act seeks to legislate against.

It is a precursor of things to come, and unless rejected entirely, or totally emasculated by the Senate, this case will once again become the subject of judicial review.

Although premature, the inevitable question of whether this act is constitutional requires mention. As the following briefly illustrates, there is impressive authority to support the position that it would be.

> MR. PUCINSKI: "I believe that this act represents the best we in Congress can do at this point in time, and I urge my colleagues to support it."
>
> "Constitutional experts who have argued in favor of the constitutionality of this type of legislation:
>
> Charles Bork, Yale Law School;
>
> Charles Allen Wright, University of Texas Law School;
>
> Archibald Cox, former Solicitor General of the United States."
>
> Congressional Record — House, H7799, August 17, 1972.

Professor Robert H. Bork, above referred to, has prepared a special analysis which explores this question in some depth.[5] Concerning the regulation of bus-

[5] Robert H. Bork, **Constitutionality of the President's Busing Proposals**, American Enterprise Institute, Washington, D.C., May 1972.

ing remedies he remarks at page 21:

> "The purpose of the provision, however, is to limit the busing of elementary school children, and there may be cases in which a district judge, free of the inhibitions of this measure, would order more busing than it permits. It is the existence of this situation that some commentators believe renders the proposal unconstitutional. But such an analysis seems simplistic. We have seen that Congress has significant power to regulate remedies, and, by definition, that means the power to require courts to apply different remedies than they would have chosen if they were completely free.
>
> "The issue of constitionality is not whether the proposed act would inhibit the use of busing (of course it would) but whether the inhibition is so great that the courts would be rendered unable to perform their constitutional function. We are necessarily dealing with a question of degree. There are good reasons to think that the degree of inhibition here is not so great as to interfere with the constitutional role of the courts. The constitutional per se rule of **Brown I** (a state or its agencies may not discriminate on grounds of race) is left entirely intact. The affirmative duty of a de jure segregated school system to desegregate is left intact. That duty, as we have seen, cannot be an absolute, and has never been held to be an absolute, because other values must be taken into account. There are many remedies other than busing available to courts and a limitation upon busing for elementary school children hardly appears to be an exercise of judgement beyond the proper scope of Congress' powers. If it is, Congress has very little real power under Section 5 of the Fourteenth Amendment.
>
> "The constitutionality of this provision de-

pends essentially upon the reasonableness of the judgements that busing is less appropriate for children in the elementary grades than it is for older students and that factors of time and distance as well as numbers of children involved are relevant criteria. Arguments for and against these propositions have often been made and there is no need to rehearse them here. Suffice it to say that reasonable men can conclude that the propositions are correct.

"It may be possible to construct an example in which the regulation of busing elementary school children seems unduly restrictive, but that is not sufficient reason to discard the entire statute. As Chief Justice Hughes said after noting the reasonableness of the Minnesota mortgage law, 'It does not matter that there are, or may be, individual cases of another aspect. The legislature was entitled to deal with the general or typical situation.'

"Finally, Section 403(a) gains support from the fact that the Supreme Court has recognized as proper the type of distinction the law draws. In discussing the factors to be weighed in framing busing orders, Chief Justice Burger stated in **Swann I**: It hardly needs stating that limits on time of travel will vary with many factors, but probably with none more than the age of the students.

"On balance, therefore, it appears that a good case can be made for the constitutionality of the President's proposal to limit busing of elementary school children."

While not precisely on point **F.H.E. Oil Co. v. C.I.R.**, 150 F.2d 857 (5th Cir. 1945) recognizes that such legislation may have legal significance, even though it never becomes law:

"A resolution adopted by the House of Representatives and agreed to by the Senate but not approved by the President or passed over his veto, was not an act of Congress and did not make or change the law, but as an expresson of opinion on a point of law, it would be entitled to respectful consideration by the courts."

IV

EDUCATION AMENDMENTS OF 1972, TITLE VIII, SECTIONS 803-806.

In light of its peregrinations through the Federal judiciary, little perspicacity is required by petitioners to realize that the point of no tomorrow is rapidly approaching. With this uppermost in mind, time is a luxury not enjoyed. Consequently, it is necessary to anticipate the Courts' response and prepare acoordingly.

Considering the overwhelming documentation, entirely contrary to the premise upon which Mr. Justice Powell based his ruling, it appears reasonable to expect that the Court will consider this issue afresh. At such time it is also anticipated that the outcome will ultimately depend upon a determination of constitutionality. To this point the following remarks are addressed.

Each of this Act's last four sections (803-806) have a common scheme: they restrict, limit, or even preclude powers of the District Court. Although the authority of Congress to take such action has never been questioned in other areas of law, this represents a historic first in school litigation. Congressional power to effectuate these measures though, comes from the same repository — the Constitution of the United States.

Several provisions appear sufficient to authorize this legislation without question, and, upon closer consideration, create the distinct impression that Congress possesses adequate residual muscle to justify much more stringent measures should it desire. Article I provides the first indication that Congress was ex-

pected to exercise some control over the judiciary. Section 8 deals with specific powers of Congress and authorizes it at Clause 9:

> "To constitute Tribunals ineferior to the Supreme Court".

Clause 18 of this same section represents the broadest grant of authority expressed in the Constitution. It directs Congress:

> "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . ."

Further evidence that a degree of congressional dependence by the judiciary was intended comes from Article III. Section 1 reads in part:

> "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Finally, there is the Fourteenth Amendment itself. Under the "equal protection clause" of Section 1, it has provided the cornerstone for school decisions. This article may, in the final analysis however, provide strongest authority for congressional action. Section 5 reads:

> "The Congress shall have power to enforce by appropriate legislation, the provisions of this article."

An examination of the provisions quoted gives rise to supporting theories mutually separate and distinct. Since the Act applies, by its own terms, to District Courts, both are legitimate. It can thus be argued that this legislation represents congressional exercise of its power to affect the jurisdiction of an inferior

Federal court under Article III, or simply use of the "enforcement powers" of §5.

This Court's history is replete with decisions recognizing that jurisdiction of lesser tribunals is absolutely dependent upon Congress. In one form or another, opinions for at least 173 years have noted it: "The political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to Congress. If Congress has given the power to this court, we possess it, not otherwise. . ." **Turner v. Bank of North America,** 4 Dall. 8, 10 n.I (U.S. 1799). "Courts created by statute can have no jurisdiction but such as the statute confers." **Sheldon v. Sill,** 8 How. 441, 449 (U.S. 1850).

An excellent discussion of Act III, Section 1, appears in **Kline v. Burke Construction Co.,** 260 U.S. 226, 234 (1922):

> "The effect of these provisions is not to vest jurisdiction in the inferior courts over the designated cases and controversies but to delimit those in respect of which Congress may confer jurisdiction upon such courts as it creates. Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution. **Turner v. Bank of North America,** 4 Dall. 8, 10, 1 L.Ed. 718; **United States v. Hudson & Goodwin,** 7 Cranch, 32, 3 L.Ed. 259; **Sheldon v. Sill,** 8 How. 441, 448, 12 L.Ed. 1147; **Stevenson v. Fain,** 195 U.S. 165, 25 S.Ct. 6, 49 L.Ed. 142. The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated

cases, but it requires an act of Congress to confer it. **The Mayor of Nashville v. Cooper**, 6 Wall. 247, 252, 18 L.Ed. 851. And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part; and if withdrawn without a saving clause all pending cases though cognizable when commenced must fall. **The Assessors v .Osborne**, 9 Wall. 567, 575, 19 L.Ed. 748. A right which thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an act of Congress after its exercise has begun, cannot well be described as a constitutional right."

A final example on this point, somewhat more recent, is **Lockerty v. Phillips**, 319 U.S. 182, 187 (1943). It is persuasive authority for the proposition that Congres, by restricting a District Court's use of busing, has withheld jurisdiction to a degree. Rather than use only the remarks of Chief Justice Stone, I prefer to repeat in its entirety that portion of the earlier decision quoted from:

"Second, in the doctrine so often ruled in this court, that the judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court), dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court), for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good. **To deny this position would be to elevate the judicial over the legislative branch of the government, and to give to the former powers limited**

by its own discretion merely." **Cary v. Curtis**, 3 How. 236, 245 (1845). (Emphasis added)

Although unnecessary to consider in the context of this argument, any discusion of jurisdiction and congressional power leads one inexorably to **Ex Parte McCardle**, 7 Wall. 506, 514 (1868). It stands for the proposition that appellate jurisdiction, even of the Supreme Court, rests within the control of Congress under Article III §2.

This is perhaps the high-water mark in judicial acknowledgement of congressional power. In the wake of voluminous debates as to the constitutionality of the President's anti-busing proposals it has become a much mentioned decision.

While an appeal in a habeas corpus case was pending before this court, Congress withdrew jurisdiction. Chief Justice Chase observed:

> "[T]he power to make exceptions to the appellate jurisdiction of this court is given by express words, . . . Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."

Even though some modern scholars may seek to disparage it as precedent today, one would do well to remember that this is a unanimous opinion, unreversed after more than 100 years.

As convincing as the foregoing may or may not have been, Section 5 of the Fourteenth Amendment affords a cogent justification that is hard to quibble with. The current trend of constitutional thought

seems to be that the powers it affords Congress are quite broad. This observation finds support in recent case law, as well as authoritative treatises. According to the excellent work of Professor Bork,[6] the scope of these powers is the subject of heated current debate. This is succinctly described in a paragraph attributed to Professor Archibald Cox:

> "Today one of the major questions of constitutional theory and practice is whether the congressional power to make binding determinations upon questions of fact and degree, acknowledged under the commerce clause, applies to legislation enacted by Congress 'to enforce' the fourteenth amendment."[7]

Those who would answer that it does, find vast support in **Katzenbach v. Morgan,** 384 U.S. 641 (1966). This case arises under the **Voting Rights Act of 1965** and deals extensively with Section 5. Referring to congressional power the majority quotes with approval at page 648:

> "It is the power of Congress which has been enlarged. Congress is authorized to **enforce** the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective." **Ex parte Com. of Virginia,** 100 U.S. 339, 345 (1880). (Emphasis in original).

At 650:

> "By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause, Art. I, § 8, cl. 18. The classic formulation of the reach of those powers was established

---

[6]Bork supra note 5 at 8.

[7]Cox, **The Role of Congress in Constitutional Determinations,** 40 Cincinnati Law Review 199, 258 (1971).

by Chief Justice Marshall in **McCulloch v. Maryland**, 4 Wheat, 316, 421, 4 L.Ed. 579:

> 'Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.'"

At this point reference is made to the earlier decided voting right case, **State of South Carolina v. Katzenbach**, 383 U.S .301, 326, 327 (1966), in dealing with the power afforded Congress by a similar section, it quoted the words of Chief Justice Marshall:

> "This power like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." **Gibbons v. Ogden**, 9 Wheat. 1, 196, 6 L.Ed. 23.
>
> * * * * *
>
> "The basic test to be applied in a case involving Section 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress . . ."

That test was identified as the one formulated in **McCulloch v. Maryland**, and since Section 2 of the Fifteenth Amendment is identical to Section 5 of the Fourteenth Amendment (as well as Section 2 of the Thirteenth, Eighteenth, and Nineteenth Admendments), it was adopted by **Morgan** supra who stated:

> "Thus the **McCulloch v. Maryland** standard is the measure of what constitutes 'appropriate legislation' under § 5 of the Fourteenth Amendment. Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what leg-

islation is needed to secure the guarantees of the Fourteenth Amendment."

The upshot of this decision appears to be a clear recognition of the broad discretion vested in Congress under Section 5. Reasoning in support of this conclusion relies heavily upon the fact that Congress enjoys a position which enables them "to assess and weigh the various conflicting considerations" in a manner superior to that of the court. This appears only logical, and if ever an issue arose which required this vital function, it must be the question of busing. Professor Bork is of this opinion:

> "The nature of the problem is one peculiarly suited to Congress' superior capacity for finding facts on a nationwide scale and making the detailed trade-off judgements required to frame a general rule applicable everywhere in the country. Courts, confined to particular fact situations and the record the litigants set before them, are less able to work out satisfactorily detailed legislative rules of the sort required here. That is the reason for the deference courts often show to congressional determinations of fact and to congressional alteration of remedies. We may conclude that Congress possesses substantial power to regulate busing under Section 5 of the Fourtenth Amendment."[8]

Having established the preferred constitutional source for the power Congress seeks to assert, it is susceptible to further refinement. "Section 5 of the Fourteenth Amendment, taken at the minimum weight that must be allotted it, confirms and reinforces Congress' historic power to deal with remedies employed by Federal courts. There is doubt about Congress'

[8]Bork supra note 5 at 16.

power to deny all remedies for an established right, but very little about its power to limit or even deny one among many".[9]

This particular point is well covered in a unique and enlightening article by Professor Henry M. Hart. The following comments are found in an uninhibited colloquy between Professor Hart as interrogator and Professor Herbert Wechsler of Columbia.

> Question: "The power of Congress to regulate jurisdiction gives it a pretty complete power of remedy, doesn't it? . . ."
>
> Answer: ". . . The denial of any remedy is one thing — that raises the question we're postponing. But the denial of one remedy while the other is left open, or the substitution of one for another, is very different. It must be plain that Congress necessarily has a wide choice in the selection of remedies, and that a complaint about action of this kind can rarely be of constitutional dimension."
>
> Question: "Why is that plain?"
>
> Answer: "History has a lot to do with it . . . But the basic reason, I suppose, is the great variety of possible remedies and even greater variety of reasons why in different situations a legislature can fairly prefer one to another."[10]

It goes without saying that there are no decisions on this point in the area of school desegregation. For almost a score of years the current has only gone in one direction, and as noted, congressional action in this regard is without precedent.

---

[9]Bork supra note 5 at 11.

[10]Hart, "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic," 66 Harvard Law Review 1362, 1366 (1953).

Decisions of this Court, from its inception, have recognized the inherent power of Congress to affect remedies. The following opinions are illustrative and, though dealing with a variety of matters, their principles, by parity of reasoning, apply.

Chief Justice Marshall, in an opinion concerning state insolvency laws, gave full recognition to this point:

> "The disinction between the obligation of a contract, and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of a nation shall direct." **Sturges v. Crowninshield,** 4 Wheat. 122, 200 (1819). See also the procedural case of the same vintage, **Bank of Columbia v. Okeley,** 4 Wheat, 235, 245 (1819).

Another early decision, which dealt with the right of contract, was **Antoni v. Greenhow,** 107 U.S. 769 (1883). Chief Justice Waite approves the language of an earlier opinion:

> "It is competent for the state to change the form of the remedy, or to modify it otherwise, as they may see fit, providing no substantial right secured by the contract is thereby impaired . . ." **Von Hoffman v. Quincy,** 4 Wall. 553 (1869).

and concludes that:

> **"In all cases the question becomes, therefore, one of reasonableness, and of that the legislature is primarily the judge."** (Emphasis added)

Finally, **Munn v. Illinois,** 94 U.S. 132 (1872):

> **"We ought never to overrule the decision of the legislative department of the government un-**

less a palpable error has been committed. If a state of facts could exist that would justify the change in a remedy which has been made, we must presume it did exist, and that the law was passed on that account." (Emphasis added)

With this lengthy preamble in mind, it is appropriate to turn now to the legislation in question. Four sections are of concern here (803-806). As the reader is aware, 803 (Broomfield Amendment) was discussed at length in Portion I.

These remarks, however, were limited to a point raised in the opinion of Mr. Justice Powell concerning congressional intent. This portion seeks to further buttress the constitutional underpinnings of the moratorium. Being a case of first impression little authority exists.

Fortunately for petitioners, however, considerable guidance has been obtained from the treatise of Professor Bork, whose remarks appear ubiquitously in this brief. Although dealing with the moratorium provisions of the Nixon anti-busing proposals, it is extremely relevant, since that language is virtually identical to Section 803. An extensive quote from this treatise is most convincing:

> "Congress' power to enact moratorium legislation in order to hold matters in status quo while it considers detailed regulation is probably best located in Article I, Section 8, Clause 18 . . . The moratorium can be defended as necessary and proper for Congress to carry into execution its power to regulate remedies, a standstill in busing orders being required so that irreparable disruptions and impairments of education do not take place before Congress can act.
>
> ". . . This means, essentially, a showing of the

likelihood of the entry of further large-scale busing orders with their concomitant heavy expenditure of funds, administrative disruption, and student inconvenience, all tending to disrupt and make less effective the educational process. Combined with such a showing should be an argument that there is reason to believe these orders go beyond the duty of affirmative dismantling of segregated school systems, and that the disruption and expense will have to be undergone a second time in order to comply with the further legislation contemplated by Congress."[11]

This thinking seems particularly appropriate in view of the recent House passage of the **Equal Educational Opportunities Act of 1972,** detailed in Portion II. From this it is apparent that at least one body of Congress wishes to effectuate detailed regulation of school busing.

This brief is likewise replete with quotations from the Congressional Record declaring the need for such a moratorium. A prime example is found in the remarks of Congressman Quie:

> "This is an extremely important necessary action designed to obtain equity and uniformity in these cases, **and perhaps to give the Federal judiciary some time to assess the mood of Congress and the Country with respect to wholesale busing of children."** (Emphasis added)
>
> Congressional Record — House — H5404, June 8, 1972.

While designed to automatically halt, pending appeal, all busing orders, regardless of title or nomenclature, it was held inapplicable in the present case. This position not only frustrates the will of Congress,

---

[11]Bork supra note 5 at 19.

but ignores language currently used in school desegregation plans. Most important, the Court in so ruling has attributed to Congress the enactment of meaningless and futile legislation.

Under the interpretation reached in **Drummond** this is the inevitable result. Section 803 is said to apply only to orders whose mere existence makes them illegal for violating the principles laid down in **Swann**, and also Section 806 of the same act.

To illustrate this point, the following excerpts from **Swann** need be remembered. At page 15:

> "The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation."

Further, at page 15:

> "If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked."

At page 16:

> "Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults."

Further, at page 16, with reference to whether schools should have a prescribed ratio of black to white:

> "To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court."

At page 17, concerning 407(a)

> "The legislative history of Title IV indicates

that Congress was concerned that the Act might be read as creating a right of action under the Fourteenth Amendment in the situation of so-called 'de facto segregation'."

The thrust of these remarks by Chief Justice Burger is to emphasize repeatedly the condition precedent to judicial involvement.Without a constitutional violation, uncorrected by school officials, judicial authority does not exist. Courts simply have no power to interfere with school systems unless there has been a constitutional violation. Vestiges of de jure segregation is considered by the courts to be such a violation. Therefore, this has been deemed sufficient to justify the use of busing as one tool for desegregation in those states.

De facto segregation, much to the contrary, is not a constitutional violation and no right of action is created. Since de facto states are not considered unlawfully segregated, it logically follows then, that busing to desegregate schools would be impossible. Therefore, busing ordered in such states could only be to "achieve racial balance". This was noted in Mr. Justice Powell's opinion at page 3; "In short, . . . the phrase 'achieve a racial balance' was used in the context of eliminating 'de facto segregation'."

De facto segregation, however, is not a constitutional violation and no right of action exists. Consequently, no justification for judicial intervention is shown and any order which required busing would be illegal on its face. Thus Section 803, under the ruling of this Court, can only apply to situations which have already been declared unlawful by **Swann.**

Under the reasoning of Mr. Justice Powell, Congress has indeed performed an act of abysmal futility,

even more vividly demonstrated when juxtaposed with Section 806 which provides that:

> "Application of Proviso of Section 407(a) of The Civil Rights Act of 1964 To The Entire United States
>
> Sec. 806. The proviso of section 407(a) of the Civil Rights Act of 1964 providing in substance that no court or official of the United States shall be empowered to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards shall apply to all public school pupils and to every public school system . . . regardless of whether . . . situated in the northern, eastern, western, or southern part of the United States."

When Section 803 is given the construction received in **Drummond,** its only possible affect would be to delay implementation of court orders, the very existence of which has been expressly forbidden by Section 806. It is also essential to note that the "evil" Congress sought to avoid with the "remedy" of Section 803, appears not only unlawful, but nonexistent. All evidence points that way, for no opinion dealing with an order which requires busing "to achieve racial balance" has been reported. Certainly this monstrous illogic was never intended by the House, Senate, and President.

The true and undeniable intention of Congress was made manifest in Portion I. Unfortunately, these explicit considerations have been muted by judicial ukase. Many years ago Mr. Justice Frankfurter,

Spiegel's Estate v. C.I.R., 335 U.S. 632, 682 (1949), addressed himself emphatically to the duty of our highest court in a situation far less compelling than this:

> "Due regard for this Court's function precludes it from ignoring explicit legislative intention even to 'yield results more consonant with fairness and reason'. **Anderson v. Wilson,** 289 U.S. 20, 27, 53 S.Ct. 417, 420, 77 L.Ed. 1004; see **Cardozo,** The Nature of the Judicial Process 14 (1921)."

At this point full consideration of Section 806 is imperative. It appears, by far, the most significant portion of the Act, since Congressional disapproval with at least one part of **Swann** is clearly evinced. Not only does it re-enact the identical language of 407(a), already interpreted by that decision, but adds the new directive that these provisions apply uniformly to every state. With this simple egalitarian-addition an entirely new dimension is achieved.

Acting almost on the heels of **Swann,** it cannot be said that, "Congress has not seen fit to amend the statute and we must assume that it has been satisfied with, and adopted, the construction given to its enactment by the courts". **Electric Storage Battery Co. v. Shimadzu,** 307 U.S. 5, 15 (1939); **Girouard v. U.S.,** 328 U.S. 61, 70 (1946).

Section 806 represents the exact opposite of the rule often relied on that re-enactment of a statute carries gloss of construction placed upon it by this Court (see **Spiegels** supra at 690, Appendix B, 50 Am. Jur. Statutes, Section 441). Instead of reflecting approval, this measure is now worded so as to completely

undermine that decision.

Chief Justice Burger's interpretation of 407(a) in **Swann** was based on several considerations, most prominent being the disparte status of de jure and de facto states. Legislative history was relied upon heavily. He concluded that Title IV created no right of action in those 30 or more states classified as de facto. Conversely, he held that other states, being de jure, could derive no benefit from the provisions of 407(a), which forbid the transportation of students.

This leads to a perplexing impasse, for how can this opinion be reconciled with the terms of Section 806? The interpretation, arrived at in **Swann,** depends entirely upon a distinction between states, but uniformity requirements added by subsequent re-enactment demand that there be none.

Two conclusions appear virtually inescapable. They cannot be reconciled and Congress has expressly rejected that portion of **Swann** which interprets 407(a). No other deductions seem possible, for Congress has seen fit to reject the distinction, so absolutely essential to that construction.

Legislative history, as earlier noted, played an important role in arriving at the meaning **Swann** accorded the language of 407(a) now incorporated in Section 806. It proves equally decisive here, for though the discussion is brief, it is most informative. Section 806 was authored and sponsored by Senator Ervin who described it as follows:

> MR. ERVIN. "Mr. President, I can state the amendment simply. **This amendment merely provides that the prohibition on busing to achieve a racial balance shall apply in all circumstances to**

all parts of the United States, and that those areas of the country which did not anticipate the Supreme Court in discovering that the separate but equal doctrine had ceased to be the law of the land will be brought into the Union and treated as a part of the Union.

"I appeal to all Senators who think we should have a unified country with uniform laws applying to all areas of the country, because that is what the amendment would do." (Emphasis added).

After a short colloquy prior to voting, Senator Pell remarked:

MR. PELL. **"Mr. President, there is no question that the South has done a better job of desegregation than the North. This measure states that the law should be applied uniformly and fairly throughout the country. As the repetition of that legal position is a correct one, I urge that it be accepted."** (Emphasis added).

At this point the vote was called for, and the measure passed unanimously 91-0.

Congressional Record — Senate—S3014, March 1, 1972.

One is hard pressed to deny the meaning of this amendment so convincingly demonstrated by a rare spirit of unanimity. The Senate has spoken, without dissent, that all states should be treated as one. Without the slightest change this was enacted into law in its present form.

This occurred at a time when every member was presumed to know of **Swann**, and as said by Mr. Justice Powell, "it could hardly be contended that Congress was unaware of the legal significance of its 'racial balance' language". Knowing then of the im-

munities afforded de facto states by this Court's interpretation of 407(a), they voted without exception to extend them to all states. In the words of Senator Ervin "they will be brought into the Union and treated as a part of the Union".

Further confirmation of the congressional demand for uniformity is provided by Section 805 which reads:

> "The rules of evidence required to prove that State or local authorities are practicing racial discrimination in assigning students to public school shall be uniform throughout the United States."

Since discrimination by state authorities was always looked upon as the essential ingredient of the de facto-de jure dichotomy, this is particularly significant. No longer can different standards of proof be applied to yield unequal results. **Keyes v. School District No. 1, Denver, Colorado,** 445 F.2d 990, 1006 (10th Cir. 1971).

No logical reason remains for perpetuating this dichotomy. State segregation laws had their demise many years ago, and these labels are only used now to justify disparate treatment for the South. This incongruity is difficult to understand, for as Senator Pell said, "there is no question that the south has done a better job of desegregation than the north".

Congress has clearly chosen to abrogate this historic distinction, long out-moded, in favor of a uniform classification of states. The consqeuences of this determination are quickly discernable and mutually exclusive. Either Congress has created a right of action in de facto states, thus outstripping the courts, or the

protection against busing orders now applies to formerly de jure states.

As openly stated by Senator Ervin and approved by his colleagues without dissent, de jure states were to be brought into the union and treated in the same manner as others. Since de facto states were granted immunity from busing orders by **Swann**, this benefit must certainly inure to those recently allowed into the fold.

This is infinitely more plausible than the alternative interpretation. One can scarcely imagine that the elected representatives of states who constituency had never experienced the wrenching shock of forced busing, would suddenly engage in self mutilation and pass without objection, legislation to insure this "benefit". Even if such bizzare results were intended, would it appear in the form of an anti busing measure? The absurdity of this should be apparent.

This provision is not only subsequent to **Swann**, but couched in terms which destroy, in parts, its viability. It is a therapeutic response by the body created under the constitution, to fulfill this role. There is no doubt that it questions the wisdom of this Court's decision, but as recognized before:

> **"There is no reason to doubt that this Court may fall into error as may other branches of the Government.** Nothing in the history or attitude of this Court should give rise to legislative embarrassment **if in the performance of its duty a legislative body feels impelled to enact laws which may require the Court to re-examine its previous judgements or doctrine." Helvering v. Griffiths,** 318 U.S. 371, 400 (1943). (Emphasis added).

The mandate's of **Brown I** and **Brown II** have not

been trifled with (**Brown v. Board of Education,** 347 U.S. 483 (1954) and 349 U.S. 294 (1955). Neither has the establishment of a "Unitary System", as defined by this Court, been impaired. **Alexander v. Holmes County Board of Education,** 396 U.S. 19 (1969).

By restating the law in this manner Congress has imposed a simple and prudent restriction on how the goals of the Fourteenth Amendment are best accomplished. Desegregation is not proscribed, only a method. There are still half a dozen or more remedies, currently used in school cases, which remain available to a District Court. Having spoken for the first time it should not be ignored.

V.

FACTUAL ANALYSIS OF COURT ORDERED PLAN

In closing petitioners are compelled to stress again the facts which entitled relief. They are sufficient, in and of themselves, to justify and perhaps even demand this Courts' full attention.

Hopefully, issues raised by recent developments will be considered provocative, but they are not essential to a reversal of **Drummond.** To reach this judgement requires no new law, only the application of priniciples unanimously expressed by **Swann.**

As substantiation for this assertion the following comparison of cases is submitted. They are based on every category the available record of both opinions will justify.

A

(Charlotte Plan Justified By Facts There)

It is essential to realize at the outset that while this Court recognized the transportation of students as a permissible tool for desegregation, its use was not made mandatory. Much to the contrary there is a clear caution that the techniques used in **Charlotte** were made acceptable by the situation which confronted the District Court.[12]

---

[12]This restriction was clearly recognized by the District Judge who noted:

> "... that the particular order entered in this case would be correct in other circumstances not before this court." (Emphasis in original). 402 U.S. 25, Note 9.

"**On the facts of this case,** we are unable to conclude that the order of the District Court is not reasonable, feasible and workable." (p. 30) (Emphasis added).

An overall reading of this decision leaves the indelible impression that the best which can be said of the District Court's order is that it was not reversed. It was never applauded and reflects only tepid acceptance. Restraint rather than adherence is implicit and inclines one to view it as the outward limits of discretion.

B.

(Limitations On A District Court)

While a Court's authority to fashion appropriate remedies is correspondingly broad, it is not unrestricted.

"No fixed or even substantially fixed guidelines can be established as to how far a court can go, **but it must be recognized that there are limits.**" (p. 28) (Emphasis added).

A recent lower court decision of considerable importance underscored this limitation, **Bradley v. The School Board of the City of Richmond, Virginia,** ___ F. 2d (4th Cir. 1972), decided June 5, 1972.

Even more recently the Chief Justice invoked a fitting analogy to emphasize this point. Speaking for the dissent in **Wright v. Council of City of Emporia,** ___ U.S. ___, ___ L.Ed.2d ___, 40 LW 4806 at 4814 (decided June 23, 1972), and joined by Justices Blackman, Powell, and Rendquist, Chief Justice Burger stated:

"In **Brown v. Board of Education,** 349 U.S. 294 (1955) (Brown II), the Court first conferred

on the district courts the responsibility to enforce the desegregation of the schools, if school authorities failed to do so, according to equitable remedial principles. **While we have emphasized the flexibility of the power of district courts in this process, the invocation of remedial jurisdiction is not equivalent to having a school district placed in receivership."** (Emphasis added).

It is this explicit limitation which serves to separate **Drummond** from **Swann, Davis,** and any other school decision approved by this Court. No rein has been applied to the power of the District Court herein, and being unfettered it was applied in a manner that appears almost vengeful. Nowhere does the record contain facts or findings sufficient to warrant the extremities resorted to. Having exceeded the extent of any measure condoned by the Supreme Court, it sails uncharted waters. This is a course District Judges may not pursue of their liking alone!

C.

(Use of Racial Ratios)

Although the outward parameters of **Swann** may be vague, certain prohibitions are most explicit. A prime example of what a District Judge may not do is illustrated by the claim that a particular degree of racial balance was required in Charlotte schools.

The record discloses that the order resulted in elementary schools whose composition ranged from 9% to 38% black as opposed to the system-wide average of 29%.

Chief Justice Berger articulated quite forcefully on this issue:

"If we were to read the holding of the District

Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, **that approach would be disapproved and we would be obliged to reverse.**" (p. 24) (Emphasis added).

Reiterated at **Winston-Salem/Forstyth County Board of Education v. Scott,** 404 U.S. 1221 (1972).

A comparison with the desegregation plan ordered for the elementary schools of Richmond County shows unquestionably that this imperative was either misconstrued or misapplied.

This plan required that 29 of the existing 42 elementary schools be paired or grouped into 10 separate zones with racial distribution as shown below.[13]

Zones	Schools	Pupils	% Black	
A	4	1522	40.8	
B	4	2154	46.1	
C	3	2189	44.4	
D	3	1940	43.7	
E	2	652	44.0	
F	2	1198	30.2	
G	3	960	38.8	
H	3	1080	43.1	
I	2	1113	40.1	
ALT.	3	1684	34.2	
TOTALS	29	14,492	41.02	Overall Black

From the diagram one is forced to conclude that awareness of the 60%-40% racial composition of the whole system was not utilized simply as a useful starting point in shaping a remedy. In the final analysis Court-ordered clustering results in an overall black

[13]Appendix V, Petition for Certiorari.

percentage that deviates only 1.02% from the system average.

Even the individual zones evidence a peristent adherence to this ratio. This point is illustrated by the permissible range of variation from the overall average. In Charlotte a fluctuation of 29% was accepted, whereas the latitude here is only 15% or 1/2 that amount. Stated conversely, the restriction imposed on Augusta was twice as extreme.

Based on all these factors, it cannot be said that "the very limited use made of mathematical ratios was within the discretion of the Court". On the contrary, it is the product of a desegregation plan which relied entirely upon them. Such a standard is constitutionally impermissible.[14]

The latest expression of this court on that precise issue was again by the Chief Justice, **Wright,** supra. Addressing himself at length to the concept he observed:

> "Obsession with such minor statistical differences reflects the gravely mistaken view that a plan providing more consistent racial ratios is somehow more unitary than one which tolerates a lack of racial balance. Since the goal is to dismantle dual school systems rather than to reproduce in each classroom a microcosmic reflection of the racial proportions of a given geographical area, there is no basis for saying that a plan providing a uniform racial balance is more effective or constitutionally preferred. School authorities

[14]This is tacitly acknowledged in the order of the District Judge who observed that while the Experts may not have set out to establish a fixed black to white ratio:"However through clustering and pairing it achieves a not dissimilar result." (Emphasis added), Appendix III, A-15, Petition for Certiorari.

may wish to pursue that goal as a matter of policy, but we have made it plain that it is not constitutionally mandate. See **Swann v. Charlotte-Mecklenburg Board of Education,** 402 U.S., at 16." At page 4813.

In view of the statistics earlier shown, scarcely any credible argument can now be advanced to support the plan. The complete reliance on racial ratios is obvious and all pervasive. In approving the final product the District Court fell into a predictable trap. This dilemma is described to perfection in 85 Harvard Law Review 3:

> "A district judge faced with pressures for a lesser degree of integration might justify his use of percentages by reference to **Swann**: since the Court has never approved a plan in which racial percentages varied more widely, the only way to be sure of compliance with the constitutional command is to approximate **Swann's** scheme." (p. 83)

As we have seen, unfortunately, the variance in racial percentage does not simply approximate **Swann,** but is twice as restricted.

D.

(Permissible Scope Of Required Transportation)

These results are achieved by a massive increase in transportation. This is a volatile subject which **Swann** dealt with in a most guarded manner.

> "The scope of permissible transportation of students as an implement of a remedial degree has never been defined by this Court and by the very nature of the problem it cannot be defined with precision." (p. 29)

Under the "Finger Plan" 9,300 additional elementary students were required to be transported from

a total Charlotte elementary population of 44,000. No figures were reported on the number bused prior, but the total for the entire system amounted to 21%.

In Richmond County there are 21,795 elementary students, of which 6,945, or 31.86%, were already being bused.[15] The order of the District Court required a transportation increase of 6,172 elementary students.[16]

This escalation has very startling consequences, for it creates a situation in which 61.77% of the elementary school children must now be bused.

Even more drastic is the impact upon the students in the 29 schools paired or clustered. Under the HEW plan 21.57% of the students enrolled in these schools were bused, a figure which now soars to 64.16%.

In considering the elementary portion of the Charlotte plan the Circuit Court determined that its increases were too extreme. They illustrated this conclusion by a formula which provides a useful comparison here.[17]

Percentage Increase of Additional Elementary Students Bused As Opposed To All Students

Charlotte	39% or 33% as Computed by Minority
Richmond County	58%

---

[15]All computations concerning Augusta-Richmond County Schools are based on figures contained in the Munzer Plans, a portion of which is set out in Appendix V, Petition for Certiorari.

[16]6,172 reflects the correct increase in elementary busing. It is in conflict with the figure of 5,681 as shown by the District Court's Order, Appendix III, Petition for Certiorari, which fails to include Alternate Zone.

[17]431 F.2d 138, 147 (4th Cir. 1970).

By this standard the disparity is perhaps more apparent. The increased elementary busing in this case is at least 19% greater than the figure classified by one Court as too extreme.

Even though this portion of **Swann** was ultimately reversed there is no indication that such increases would be approved elsewhere. Certainly there is nothing to indicate that they could be expanded to an even greater extent.

E.

(Valid Objections To Transportation)

Perhaps the most formidable consequence of the District Court's order is the effect it has on the grade structure of elementary schools. Previously the school system had been operated on a 7-2-3 basis which enabled a child to complete the first seven years in one school.

Pursuant to this order 69% of the elementary schools have been paired or clustered. They no longer have a standard grade structure, as the number of grades in a particular school depends on the number of schools in its zone. The size of the zone also dictates the number of schools a child must now attend during the course of elementary education.

Seven zones are composed of either three or four schools. The students who attend these schools constitute 53% of the entire elementary population. Thus we have a situation which requires over 1/2 of the elementary children in the system to attend three or four separate schools in seven years.

The absurdity of this arrangement is emphasized

by comparison with the "Finger Plan".[18] It served to pair or cluster 46% of Charlotte elementary schools in such a manner as to achieve a 1-4 and 5-6 grade structure.

By these categories compulsory changes are minimized. Elementary children will therefore attend, at the most, only two schools. This is a factor readily distinguished from the procrustean demands of the Augusta counterpart.

A portion of **Swann** is addressed directly to this combination of evils:

> "An objection to transportation of students may have validity when the time or distance of travel is so great as to risk either the health of the children or significantly impinge on the educational process." (p. 30)

Transportation of better than six of every ten elementary students, some over long distance, in conjunction with the requirement that 53% must attend three of four elementary schools is indeed a situation which, "impinges on the educational process".

F.

(Capacity To Implement)

A school desegregation plan must also have room for pragmatic considerations. A restriction is implicit in **Swann**:

> "25. The remedial technique of requiring bus transportation of public school students for purposes of racial desegregation is within a Federal District Court's power to provide equitable relief, where . . .

[18] 311 F.Supp. 265, 280, 281 (W.D.N. Car. 1970).

(2) **Implementation of the District Court's decree is well within the capacity of the local school authority.**" (Emphasis added).

A similar theme was expressed in **Davis v. Board of School Com'rs of Mobile County**, 402 U.S. 31, 37 (1971) by noting that desegregation should be achieved "taking into account the practicalities of the situation".

This was resolved affirmatively in Charlotte for obvious reasons. The school system had a total operating budget of $51,000,000 of which approximately $500,000, or less than 1% (0.0098), was spent for annual transportation costs.[19]

The cost of increased elementary transportation was determined to be $672,000, or only 1.2% of the annual budget. Combined with current transportation expenditures it amounted to no more than 2.3% of that budget.

A radically different situation exists for Augusta's school system whose annual budget is only $21,000,000. Of this sum $572,000 was spent for transportation before the Court order. This is 2.7% of the total budget and represents a larger portion than was spent in Charlotte even after the increased elementary costs.

Here the additional transportation will require $644,000,[20] or 3.7%, of the budget. When combined with current outlays it amounts to some 5.8%. The aggregate of these costs, irrespective of percentages, is $44,000 more than the comparable figure in Charlotte.

---

[19]431 F.2d 138, 156 (4th Cir. 1970).

[20]This is a minimum figure and requires that schools be opened at hours ranging from 7:30-10:30 A.M.

G.

(Busing Not Demanded)

In the space of a single year this school system has been wrenched to an unbelievale extreme. Only 12 months ago schools were operated under an HEW plan approved by the District Court.

Without respite or interlude it is now decreed that an incredible gulf be leaped in a single bound. How has this all come about? The only plausible answer is that the lower Court misread the requirements of **Swann.**

Very persuasive support for this proposition is found in the words of the District Judge wherein he categorizes it as the "Busing" and "Racial Ratio Case".[21]

Several other Courts have viewed it differently, and, I think, properly.

> "While this case approved the use of busing as one tool for school desegregation, it did not hold that the plan implemented in Charlotte was a Constitutionally commanded plan, or that a less drastic plan might not have met Constitutional requirements." **Davis v. Board of Education of North Little Rock, Ark.,** 328 F.Supp. 1197, 1204 (E.D. Ark. 1971).

Even more emphatically:

> **"We therefore, initially observe that while the Supreme Court found legally tolerable what may be referred to as the Mecklenburg rule, it by no means directed that its commands be obeyed everywhere."** (p. 636)

---

[21]Appendix III, Petition for Certiorari.

"Swann approved a District Court ordered plan for the busing of children to improve the racial mix in the involved school system. **It did not, however, direct that a plan of transporting school children must be a part of every new plan for improvement of the objective of desegregation." Goss v. Board of Education of City of Knoxville, Tenn.,** 444 F.2d 632, 537 (6th Cir. 1971). (Emphasis added).

Recent Courts in some instances have even found busing to be undesirable. A graphic example may be seen in **Calhoun v. Cook,** ____ F.Supp. ____, (N.D. Ga. 1972) decided June 8, 1972. Here the District Judges for the second time expressly rejected a mass busing plan for Atlanta, Georgia.

This determination was reached after an incisive appraisal of busing, its ramifications, and the competing interests involved.

Such a conclusion is justified by the words of Chief Justice Burger:

"A school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. **The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution."** (pp. 15, 16) Emphasis added)

This clearly contemplates that busing is a remedy that must be chosen and limited with regard to other values upon which it impinges. See also **Cisneros, Austin supra.**

H.

(Age Of Students To Be Bused)

The availability of less rending solutions is well

illustrated by the secondary schools. A constitutional plan for their desegregation was approved by the same Court on June 13, 1972. It did not require the extremes of the elementary plan, more importantly, it was accomplished without significant increase in busing.

We therefore have a complete inversion in Richmond County. Because of this anomaly the burdens of transportation have been cast exclusively upon the youngest students.

Certainly this is a travesty **Swann** intended to avoid by recognizing that the limits on permissible transportation would be affected by many factors:

> **". . . but probably with none more than the age of students."** (p. 31) (Emphasis added).

I.

(Feasibility Of Charlotte Plan)

Considerable emphasis was placed by this Court in **Swann** on the resulting increase in transportation efficiency. Elementary students, under that plan, would now travel less than 1/2 the average time and distance formerly required for the system.

> "In these circumstances, we find no basis for holding that the local school authorities may not be required to employ bus transportation as one tool of school desegregation." (p. 30)

Such stress inclines one to suspect that, absent these factors, the decision may have been otherwise.

The Richmond County Plan is devoid of such salutary aspects. Both the time and distance of bus routes have been increased for every zone. No major

transportation arteries exist.[22]

> **"I don't think this would make a great deal of difference in Augusta, in the sense that there are no good, through, expressways for transporting kids here. The main highways are stop and go now."** (Emphasis added)

Conversely, there is only the ubiquitous freight train, the tracks of which serpentine across the city.[23]

J.

(Single Grade Schools)

To fully appreciate this portrait of an educational anathema one must realize the extreme measures to which its drafters were willing to resort.

> "Well, there's one major problem that I feel must be discussed and brought to light, **and that is the fact that this town is split in two by a railroad, and at the present time we have one regular school bus crossing that railroad track."** (Emphasis added)
>
> • • • • •
>
> **"It completely blocks the whole town. There's no way to get around it except over the Gordon Highway. The police and fire departments are constantly faced with this hazard."** Emphasis added)

In order to satisfy an obsession for predetermined racial balance, ratios were given precedence over children. This manifests itself in the creation of single grade schools, a final atrocity which exposes the faulty

---

[22]Testimony of Mr. Herman, page 43, Transcript of hearing held October 8, 1971.

[23]Testimony of Mr. Turner, Transportation Director, Richmond County School System, page 206, Transcript of hearing held December 17, 1971.

concept upon which it is based.[24]

Consequently, there now exists in Richmond County one entire school devoted to third grade students, with another which houses only fifth graders.[25] The isolation that results for these students is admittedly undesirable, but how else could the desired percentages been achieved?[26]

> Question: In essence, your plan deals with a mass movement to achieve a racial balance? You do not consider the individual . . .
>
> Answer: Well, "mass movement" is a relative term and within your framework I suppose it would be mass movement.
>
> **"Well, that's actually the same question about isolation of any group in any educational process and I wouldn't say that isolation in any particular group like this is an ideal type of solution, but in this case, how else does one do this?"**

This plan is a mutation, not the legitimate progeny of **Swann.** Unfortunately, however, this strain will thrive and even more aberrant versions will follow unless this Court demands otherwise. It could and should be done in a case such as this.

---

[24]Cross-examination of Dr. Munzer, page 110, Transcript of hearing held December 17, 1971.

[25]Appendix III, A-21, 22, 26; Appendix V, A-49.

[26]Testimony of Mr. Herman, page 35, Transcript of hearing held October 8, 1971.

CONCLUSIONS

This brief has been submitted with more than normal apprehension that it might go unheeded. It has become increasingly apparent, of late, that the merits of this case may be obscured completely by geographical considerations. Hopefully, such skepticism is unwarranted, and the fact that a deep south school system is involved will be inconsequential.

Regardless, petitioners desire that their position be on record and completely documented. Someday, perhaps, this will prove informative, for if cases such as this continue to be ignored our entire judicial system may undergo a devastating reassessment.

We do not belabor our highest Court with a cause founded upon Jim Crow law, enacted in the dark of night by a klan-filled legislature. Much to the contrary, we rely on an Act of Congress (the law of the land unless otherwise declared), two recent full bench decisions of the Circuit Court, and, finally, this Court's unanimous opinion in **Swann.** If that authority is shoddy, then we deserve nothing.

The last two weeks have provided a rude and frightening awareness. Events which prompted this ominous realization are fully described herein and have given rise to genuine consternation which cannot go unexpressed. These remarks reflect concern, not disrespect, and since our day in court is problematic, this may well be our only forum.

Seeking to utilize the moratorium provisions of Section 803, enacted specifically for cases such as this, I moved for a stay. To my utter amazement a District Judge, long admired, branded this as an effort to deprive others of Fourteenth Amendment rights.

The denial, at this point, is anticlimatic, but the reason why it was done made a vivid impression. It was held that "until all appeals are exhausted" did not contemplate "certiorari", which just happened to be the only way this case could ever get before the Supreme Court. Resort to such logic by a Judge, whose scholarly opinions are always tightly reasoned, must have been painful.

Admittedly dismayed, we proceed on. Next to rule on the merits of this issue was the Honorable John R. Brown, Chief Judge of the Fifth Circuit Court of Appeals. He takes pride in coming to grips with issues. When another Judge, **Austin** supra, counseled the court to wait he responded: "Were we to do so we would, in my view, abdicate our function . . . To the contrary this court and each of its members faces up to hard decisions. We have made them." That determination vanished here. He simply wrote denied, thereby indicating, to me at least, that the reasoning of the District Judge was more than he could approve but better than he wished to do himself.

Next to confront this growing dilemma was Mr. Justice Powell, whose courtesy I remember and appreciate. He denied the stay, and though rejecting the ruling below his opinion appeared equally vulnerable. It relied upon congressional intent, the one ground that could be refuted, or so it seemed.

Page after unimpeachable page from the Congressional Record reassured me of his error. Seeing only the law, and what its authors said it meant, we felt obligated to bring this oversight to the attention of the Chief Justice. Another stay, meticulously documented was filed and a week passed. Today I learned it was denied without comment.

At this juncture one must admit to a considerable measure of disillusionment. Having started the journey armed with what was and still is the law, though it now has no practical affect, our reception was unexpected. Twice we received denials based on reasons which could not stand the light of day. Twice again, the Chief Judge and the Chief Justice have taken refuge in silence.

Certainly this response is within the prerogative of a Judge or Justice, but where does it leave us? Does it mean that an interpretation, completely antithetical to Congress' intent, has become the law of the land? Did Congress really act with such buffoon like ineptness as to legislate a stay for court orders both they and **Swann** declare illegal?

I do not know — neither will anyone else. Surely, in so vital an issue, this country deserves more from its highest tribunal than muteness.

Respectfully submitted

O. TORBITT IVEY, JR.
Suite 500
The 500 Building
Augusta, Georgia 30902

Attorney for Petitioners

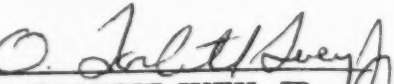
September 8, 1972

HARRIS, CHANCE & McCRACKEN

CERTIFICATE OF SERVICE

This is to certify that I have on this day served the Honorables Franklin H. Pierce, Leonard O. Fletcher, Jr., and J. H. Ruffin, counsel for respondents by personally handing them three copies each of the within motion and supplemental brief.

This 15th day of September, 1972.



O. TORBITT IVEY, JR.
Suite 50
The 500 Building
Augusta, Georgia 30902

Attorney for Petitioners

SEP 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-79

COUNTY BOARD OF EDUCATION OF RICHMOND COUNTY, GEORGIA, *et al.*,

Petitioners,

vs.

ROBERT L. ACREE, *et al.*

No. 72-167

ANN GUNTER DRUMMOND, *et al.*,

Petitioners,

vs.

ROBERT L. ACREE, *et al.*

PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

JOHN H. RUFFIN, JR.
1101 11th Street
Augusta, Georgia 30903

JACK GREENBERG
JAMES M. NABRIT, III
CHARLES STEPHEN RALSTON
NORMAN J. CHACHKIN
SYLVIA DREW
10 Columbus Circle
New York, New York 10019

Attorneys for Respondents
ROBERT L. ACREE, *et al.*

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement	2
Reasons Why the Writs Should Be Denied	3
Conclusion	6
Appendix A	1a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-79

COUNTY BOARD OF EDUCATION OF RICHMOND COUNTY, GEORGIA, *et al.*,

Petitioners,

VS.

ROBERT L. ACREE, *et al.*

No. 72-167

ANN GUNTER DRUMMOND, *et al.*,

Petitioners,

VS.

ROBERT L. ACREE, *et al.*

PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 458 F.2d 486 and the opinion of the United States District Court for the Southern District of Georgia at 336 F. Supp. 1275.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Questions Presented

These two petitions for writs of certiorari to review the same judgment of the United States Court of Appeals for the Fifth Circuit, one filed by the school authorities of Richmond County, Georgia and one filed by a group of white parents who intervened in this school desegregation action which had been pending since 1964, each present basically the same claim: that the order of the district court, as affirmed by the Court of Appeals, directing implementation of a pupil desegregation plan of which transportation was an integral part is unauthorized by the principles elucidated in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) because (a) the plan is projected to achieve at each elementary school a student body of racial composition so nearly identical as to merit description as a "racial balance" plan; and (b) the time, distance and expense of the transportation which would be required to implement the order is so great as to be beyond the sort of plans contemplated by this Court in *Swann*. The petition in No. 72-167 also raises certain questions with respect to a recently enacted statute which have never been presented to any court in the context of this case and which, in any event, have no bearing upon this case.

Statement

We shall not belabor the facts by adding materially to the already lengthy statements set out in the Petitions; the clearest and most cogent description of the history of this

school desegregation case is to be found in the district court's order, reprinted at pages A-7 through A-32 of the Appendix to the Petition in No. 72-167.

After this Court's decision in *Swann, supra*, a pending appeal in the United States Court of Appeals for the Fifth Circuit was remanded to the district court with instructions "forthwith to constitute and implement a student and faculty assignment plan that complies with the principles established in *Swann* v. *Charlotte-Mecklenburg Board of Education . . .*" *Acree* v. *County Board of Education*, 443 F.2d 1360. At that time, the public schools of Richmond County, Georgia operated upon a strict geographic zoning student attendance plan, under which traditionally black and white schools retained their racial identities. (See 336 F. Supp. at 1277-78, Appendix to Petition in No. 72-167, pp. A-12 through A-13). Following a series of conferences, hearings, and opportunities afforded respondents to prepare and propose a desegregation plan for the Richmond County schools which would meet constitutional standards, (none of which were acted upon), the district court (pursuant to the authority confirmed by *Swann*) appointed its own experts to suggest alternative desegregation plans, and approved one of such plans for implementation on a phased basis, with complete implementation to occur effective with the commencement of the 1972-73 school year. All parties appealed and on March 31, 1972 the judgment of which review is sought, affirming the district court order with a modification only as to timing, was entered.

Reasons Why the Writs Should Be Denied

These petitions do little more than simply ask this Court to overrule its decision in *Swann* because once again a school board and some of its white patrons do not desire effective desegregation of the public schools. The vaunted

"racial balance" supposedly to be achieved by implementation of the district court's order is hardly the "wooden resort to racial quotas" which this Court held in *Swann* was not required to remedy the denial of Fourteenth Amendment rights. See *Drummond* v. *Acree*, No. A-250 (September 1, 1972) (Mr. Justice Powell, Circuit Justice), page 3.

Both Petitions list the overall population ratios of the various zones within which individual schools are paired (Petition in No. 72-79, pp. 9 and 10; Petition in No. 72-167, p. 10) rather than demonstrating the variation between the populations of each school. These are shown in the projections submitted by the court-designated experts (reprinted at pp. A-39 through A-54 of the Appendix to the Petition in No. 72-167). The individual schools are projected to range from 28.7% black (p. A-48) to 50% black (p. A-42). While this range is not quite so large as that in Charlotte, it is Petitioners, and not the plaintiffs or either of the Courts below, who are here exaggerating numbers far beyond their significance.

Whatever one's view of the range in racial breakdowns among schools from 28 to 50%, the plan ordered implemented by the district court was not designed to come as close to the system-wide ratio in Richmond County as possible. In fact, it was not prepared from data listing the race, residence and grade level of every student in the system (which would have permitted its draftsmen to design zones for individual or paired schools so as to bring about a far closer tolerance among the various schools) but was based simply upon combining the previously existing zones for each school, which had been drawn by the county school authorities, and altering their grade structures through contiguous and non-contiguous pairing and clustering, in accordance with their capacities and the need to bring about some real desegregation.

Frankly, it is difficult to understand the exaggerated claims in both Petitions that this is a racial balance plan. The explicit holdings to the contrary by both courts below are clearly correct; the mandates of this Court in *Swann* received only respectful application by a district court operating under great pressure and without cooperative assistance from the school authorities,[1] and a Court of Appeals intimately familiar with the issues in school desegregation cases.

In a similar vein, the Petitions are filled with claims that the transportation of school children required under this plan is far greater in distance, time and expense than that approved by the Court in *Swann*. Curiously there is not a single reference to any evidence concerning these matters in either Petition but merely the sort of *ad hoc* claim that a round trip of 11.8 miles in Richmond County will take two hours a day (Petition in No. 72-79, p. 8). There may be some practical problems in implementing the desegregation plans, but not only will "a good faith effort by the school board . . . overcome any logistical problems that might arise," 458 F.2d at 488, but neither the decree of the district court nor the judgment of the Court of Appeals in any way restricts the parties from seeking modifications should insuperable, practical difficulties arise when the plan is actually implemented. See *Kelley* v. *Metropolitan County Board of Education*, No. 71-1778 (6th Cir., May 30, 1972) at pp. 22-25 (reprinted as Appendix A).[2]

In short, none of the Petitioners have raised significant claims of any substance to the effect that the lower courts exceeded the equitable remedial powers described in *Swann*,

---

[1] Here, as in *Swann*, the exercise of remedial authority by the district court was prompted by the total default of school officials.

[2] Thus intervenors should present any "less rending" (Petition in No. 72-167, p. 16) but equally effective elementary school desegregation plan to the district court.

and only the overruling of that unanimous decision could justify altering the judgment below.

Finally, the Petitioners in No. 72-167 make some suggestions that Sections 805 and 806 of the Education Amendments of 1972, P.L. 92-138, somehow affect this litigation. As to Section 805, there is not a whisper of a suggestion in the Petition that the trial court employed any non-uniform rule of evidence in reaching its result; and with regard to Section 806, we are unable to fathom any suggestion in this Court's *Swann* decision that it would not apply its interpretation of 42 U.S.C. § 2000c-6 in any appropriate case no matter in what jurisdiction it arose. In any event, that section applies or does not apply to this case in exactly the same manner as it did in *Swann*.

CONCLUSION

For the foregoing reasons, respondents Acree, et al. respectfully pray that the writs of certiorari be denied.

Respectfully submitted,

JOHN H. RUFFIN, JR.
1101 11th Street
Augusta, Georgia 30903

JACK GREENBERG
JAMES M. NABRIT, III
CHARLES STEPHEN RALSTON
NORMAN J. CHACHKIN
SYLVIA DREW
10 Columbus Circle
New York, New York 10019

Attorneys for Respondents
ROBERT L. ACREE, *et al.*

Appendix A to Brief in Opposition to Certiorari

Nos. 71-1778-79

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ROBERT W. KELLEY, ET AL.,
HENRY C. MAXWELL, JR., ET AL.,

Plaintiffs-Appellees,

v.

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, C. R. DORRIER, Chairman, *et al.*,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

Decided and Filed May 30, 1972

Before:

EDWARDS, CELEBREZZE and MCCREE,

Circuit Judges.

* * * * *

III PRACTICAL PROBLEMS

If there is an appellate issue of substance in this appeal, it is to be found in the practical problems which appellants

claim have developed since the entry of the District Judge's order. Appellant summarizes these issues thus:

> A plan which exposes the children in the school system to undue danger to health and accident, interferes with their education by requiring excessive periods of time on buses, causes them to leave home before daylight or to return home after dark, exposes them to the dangers of travel in old and inadequately maintained equipment and causes elementary school children, both black and white, to suffer hardships to which young children should not be exposed can hardly be termed feasible, workable, effective and realistic.

Substantial as these problems appear to be on the surface, there are two reasons why no relief can be granted in this forum. The first is that no motion for relief pertaining to these facts has ever been filed by appellant in the District Court. These statements at this point are allegations and they are controverted by the appellee. This, of course, is an appellate court—not a trial court. As appellants well know, the arena for fact-finding in the federal courts is the United States District Court. Until these claims have been presented in a trial court, with an opportunity for sworn testimony to be taken and controverted issues and facts decided by the processes of adversary hearing, this court has no jurisdiction.[1]

---

[1] During the pendency of an appeal, jurisdiction of the case lies, of course, in the appellate court. There is, however, familiar law to deal with an unexpected problem which arises in this period concerning the actual terms of the order or judgment under appeal. The District Court may on being apprised of the problem and having determined its substantiality (with or without hearing) certify to the appellate court the desirability of a remand for completion or augmentation of the appellate record. No memory in this court encompasses a refusal of such a request.

The record is clear that no request for remand was made by the District Court, obviously, at least in part, because appellants made no motion for relief before the District Court.

The second reason as to why appellants are entitled to no relief on this issue probably serves to explain the first. The entire "record" upon which appellant bases his plea for relief as to practical problems is a "Report to the Court" of Dr. Brooks, Director of Schools of the Metropolitan County Board of Education. This report is dated October 18, 1971, just over a month after the opening of school. While we are advised that it was sent to the District Judge, as we have noted, no motion of any kind seeking any District Court action was ever filed concerning it. Even more important, the statement on its face suggests that local authorities in Nashville and Davidson County have not made good faith efforts to comply with the order of the District Judge.

Dr. Brooks' affidavit does present this exculpatory explanation which serves to point in the direction of other authorities as those responsible for the inconveniences and hazards of which Dr. Brooks' statement speaks. The statement says:

> The School Board is fiscally dependent in that its budgets must be approved by the Metropolitan City Council. In approving the budget of the School Board on June 30, 1971, Council members demanded assurance that no funds included in the budget would be used to purchase buses for the purpose of transporting students to establish a racial balance. The 1971-72 budget did provide for the purchase of 18 large buses to replace obsolete equipment to provide transportation for students to the new comprehensive McGavock High School.

It is clear, however, that neither the Metropolitan City Council or, for that matter, the Legislature of Tennessee can forbid the implementation of a court mandate based upon the United States Constitution. In a companion case to *Swann, supra*, Chief Justice Burger, writing again for

a unanimous court, held that an anti-busing law whic flatly forbids assignment of any student on account of ra or for the purpose of creating a racial balance or ratio i the schools and which prohibits busing for such purpose was invalid as preventing implementation of desegregatio plans required by the Fourteenth Amendment. *North Car lina State Board of Education* v. *Swann*, 402 U.S. 43, 45-4 (1971). *See also Cooper* v. *Aaron*, 358 U.S. 1 (1958).

Dr. Brooks' statement also furnishes the bus schedule o the Metropolitan County Board of Education by year models. It shows that the Board has an average of 18 buses for each of the last 10 model years. The 18 buse purchased in 1971 were described by Dr. Brooks as "t replace obsolete equipment." It appears from the Metr politan Board's own statements that the Board and th local authorities in Nashville did not purchase one piec of transportation equipment for the purpose of convertin the Metropolitan County Board of Education school syste from a dual school system segregated by race into a unitar one, as called for by the District Judge's order.

At court hearing we had been puzzled as to why couns for the Board had failed to go back to the District Court t report on the grievous circumstances which he so strongl alleged before us. Like most decrees in equity, an injun tive decree in a school segregation case is always subje to modification on the basis of changed circumstance *Sloan* v. *Tenth School District of Wilson County*, 433 F.2 587, 589-90 (6th Cir. 1970). Further acquaintance with th record, which, of course, the District Judge would hav known in detail, leaves us in no further quandry as to th reasons for counsel's reluctance.

* * * * *